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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 520

LEWIS-SIMAS-JONES COMPANY, PETITIONER,

vs.

SOUTHERN PACIFIC COMPANY

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST APPELLATE DISTRICT, STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED OCTOBER 21, 1930

CERTIORARI GRANTED DECEMBER 1, 1930

(35,442)

(35,442)

SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST APPELLATE DISTRICT, STATE OF CALIFORNIA

INDEX

	Original	Print
Record from district court of appeal of California	1	1
Caption (omitted in printing)	1	
Record from superior court of city and county of San Francisco	2	1
Complaint	2	1
Exhibit "A"—Report and order of I. C. C.	6	3
Demurrer	10	5
Answer	12	6
Exhibit "A"—Export bill of lading, Nov. 3, 1923	19	10-*a*
Exhibit "B"—Translation of export bill of lading	20	10-*b*
Exhibit "C"—Export bill of lading, Nov. 13, 1923	30-*a*	18-*a*
Exhibit "D"—Translation of export bill of lading	31	19
Exhibit "E"—Export bill of lading, Nov. 24, 1923	41-*a*	26-*a*
Exhibit "F"—Translation of export bill of lading	42	27
Demurrer to answer	53	33
Order on demurrer, etc.	54	34
Order on motions	55	35
Amendment to answer	56	35

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 22, 1931

	Original	Print
Demurrer to answer as amended	59	37
Order overruling demurrer to amended answer, etc.	61	38
Findings of fact and conclusions of law	61	38
Judgment	69	43
Clerk's certificate.....(omitted in printing)	71	
Notice of motion for new trial	72	44
Notice of appeal	73	45
Stipulation re transcript of record	75	45
Clerk's certificate.....(omitted in printing)	76	
Opinion, Spence, J., and judgment	77	46
Order denying petition to hear, supreme court	85	51
Order denying rehearing	86	52
Clerk's certificate.....(omitted in printing)	87	
Order allowing certiorari	88	52

[fol. 1] [Caption omitted]

[fol. 2]

IN SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, DEPT. NO. 4

No. 172,283

LEWIS-SIMAS-JONES CO., Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, Defendant

COMPLAINT FOR DAMAGES—Filed Aug. 11, 1926

The plaintiff complains of the defendant herein and for cause of action alleges:

I

That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of California.

II

That defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky and doing business in the State of California. That said defendant is a common carrier by railroad for hire in interstate commerce.

[fol. 3]

III

That the defendant, in the year 1923, delivered to plaintiff at San Francisco, California, three carloads of Cow Peas which the said defendant, in conjunction with the Southern Pacific Railroad Company of Mexico, had theretofore transported under a through bill of lading and joint through rate from Navojoa, Sonora, Mexico. That said defendant collected from plaintiff at San Francisco, California, for the said transportation, the sum of $3,828.74 which said transportation charges were based upon weight of 287,875 lbs. and joint through rate of $1.33 per 100 lbs.,

which said joint through rate was named in a tariff duly published and filed with the Interstate Commerce Commission by the said defendant and the Southern Pacific Railroad Company of Mexico, to wit, Pacific Freight Bureau Tariff 20-D, I. C. C. 594, of F. W. Gomph, Agent.

IV

That the said joint through rate of $1.33 per 100 lbs. from Navojoa, Sonora, Mexico, to San Francisco, California, was unjust and unreasonable to the extent that it exceeded 94¢ per 100 lbs.

V

That on September 18, 1925, the Interstate Commerce Commission duly made and entered its order directing [fols. 4 & 5] said defendant to pay to the said plaintiff on or before November 23, 1925, the sum of $1,122.72, with interest thereon at the rate of six per cent per annum from January 21, 1924, as reparation on account of the collection of the aforesaid unreasonable rate. That a true and correct copy of the said order is attached hereto marked "Exhibit A."

VI

That no part of said sum of $112-.72 or interest thereon has been paid and the whole thereof is now due, owing and unpaid by the said defendant to the said plaintiff.

Wherefore plaintiff prays judgment against the defendant in the sum of $1246.32 with interest thereon from November 23, 1925; for reasonable attorney fees and cost of suit.

E. W. Hollingsworth, Attorney for Plaintiff.

Duly sworn to by F. J. Jones. Jurat omitted in printing.

[fol. 6] EXHIBIT A TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. 16183

LEWIS-SIMAS-JONES COMPANY

v.

SOUTHERN PACIFIC COMPANY

Submitted June 12, 1925. Decided September 18, 1925

Rate charged on cow-peas, in carloads, from Navajoa, Sonora, Mexico, to San Francisco, Calif., in 1923, found unreasonable. Reparation awarded.

E. W. Hollingsworth and Bishop & Bahler for complainant.

James R. Bell, G. H. Muckley, Elmer Westlake, F. W. Mielke and James E. Lyons for defendant.

Report of the Commission

Division 4, Commissioners Meyer, Eastman, and Woodlock

BY DIVISION 4:

This case was presented under the shortened procedure. Exceptions were filed by defendants to the report proposed by the examiner.

Complainant is a corporation and has its principal place of business in San Francisco, Calif. By complaint filed [fol. 7] July 31, 1924, it is alleged that the rate charged for the transportation of 3 carloads of cow-peas which moved from Navojoa, Sonora, Mexico, to San Francisco, during November, 1923, was unreasonable. Reparation only is asked. Rates will be stated in amounts per 100 pounds.

The shipments aggregated 287,875 pounds and averaged 95,958 pounds per car. Charges were collected at the rate of $1.33, minimum 40,000 pounds per car. At the time the shipments moved there was a rate of 94 cents applicable on peas, Mexican (Garbanzo) minimum 60,000

pounds per car, and this rate was made applicable on cow-peas April 19, 1924, and is now in effect.

The shipments moved over the Southern Pacific Railroad Company of Mexico, the West Coast Route, 377 miles to Nogales, Ariz., and defendant's line 1,036 miles to destination, total distance 1,413 miles. The rate charged yielded earnings which averaged 90 cents per car-mile, and 18.8 mills per ton mile. The present rate would have yielded on these shipments in excess of 63 cents per car mile and 13.3 mills per ton mile, and nearly 40 cents per car-mile at the minimum weight now applicable.

Defendant moves to dismiss the complaint, alleging that we lack jurisdiction over joint rates from points in an [fol. 8] adjacent foreign country to points in the United States. The motion is denied. International Nickle Co. v. Director General, 66 I. C. C. 627.

At the time the shipments moved defendant concurred in a rate of 94 cents, minimum carload 60,000 pounds, on garbanzos between the points here in issue. Garbanzos, or chick-peas, and black-eyed beans, or cow-peas, are both used for human and for animal consumption; and such physical differences and differences in value as may exist between them would tend to favor cow-peas. Although defendants have made some showing of difficult transportation conditions in Mexico and that the rates on both garbanzos and cow-peas were influenced by water competition, other comparisons of record support complainants' contention. There was no real justification for a higher rate on cow-peas in 1923 than was maintained on garbanzos; for whatever inducement there was for the establishment of the rate on garbanzos that rate should, at the same time, have been extended to cover cow-peas.

We find that the rate of $1.33 per 100 charged, in 1923, for the transportation of 3 carloads of cow-peas from Navajoa, Sonora, Mexico, to San Francisco, Calif., was unreasonable and unjust to the extent that it exceeded 94 [fol. 9] cents per 100 pounds; that the shipments moved as described; and that at destination complainant paid and bore the charges thereon and was damaged thereby. We also find that the defendant, the Southern Pacific Company, in so far as it participated in the transportation and rates in issue was a tort feasor and that it should

make reparation for the damage to complainant in the sum of $1,122.72, with interest.

Order

AT A SESSION OF THE INTERSTATE COMMERCE COMMISSION, DIVISION 4, HELD AT ITS OFFICE, IN WASHINGTON, D. C., ON THE 18TH DAY OF SEPTEMBER, A. D. 1925

No. 16,183

LEWIS-SIMAS-JONES COMPANY

v.

SOUTHERN PACIFIC COMPANY

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, that the above named defendant be, and it is is hereby authorized and directed to pay unto complain- [fol. 10] ant, Lewis-Simas-Jones Company, on or before November 23, 1925, the sum of $1,122.72, with interest thereon at the rate of 6 per cent per annum from January 1, 1924, as reparation on account of an unreasonable rate exacted for the transportation of 3 carloads of cow-peas from Navojoa, Sonora, Mexico, to San Francisco, Calif.

By the Commission, division 4.

George B. McGinty, Secretary. (Seal.)

[File endorsement omitted.]

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

DEMURRER TO COMPLAINT—Filed Sept. 17, 1926

Now comes the defendant in the above entitled action and demurs to the complaint on file therein, and as grounds therefor specifies as follows, to wit:

I

That the complaint does not state facts sufficient to constitute a cause of action.

[fol. 11] II

That the court has no jurisdiction of the subject of the action.

III

That it appears from the face of the complaint that the Interstate Commerce Commission had no jurisdiction to order this defendant to pay any reparation on the ground of unreasonableness of a joint through rate assessed and collected on shipments originating in the Republic of Mexico and destined to a point in the United States, and transported under a through bill of lading and upon a joint through rate.

Wherefore defendant prays that plaintiff take nothing by its complaint herein and that defendant have judgment for its costs.

F. W. Mielke, A. L. Whittle, James E. Lyons, Attorneys for Defendant.

I hereby certify that I am one of the attorneys for the defendant in the above entitled case and that I have read the foregoing demurrer and know the contents thereof; that in my opinion the same is well taken in point of law and is not interposed for the purpose of delay.

James E. Lyons.

[fol. 12] (Endorsed:) Service of the within demurrer is admitted this 16th day of September, 1926. E. W. Hollingsworth, Attorney for Plaintiff.

[File endorsement omitted.]

In Superior Court of City and County of San Francisco

Answer to Complaint—Filed Jan. 3, 1927

Now comes the above named defendant and, without waiving its demurrer to the complaint on file in the above

entitled action, for answer to the complaint admits, denies and alleges as follows, to wit:

I

Admits the allegations of paragraphs I, II and III of said complaint.

Defendant alleges that the Southern Pacific Railroad Company of Mexico (Ferrocarril Sud-Pacifico de Mexico), referred to in said paragraph III, is a corporation organized and existing under laws of the State of New Jersey, and operates a line of railroad exclusively within the Republic of Mexico and not otherwise. Avers that said [fol. 13] Southern Pacific Railroad Company of Mexico is, therefore, not subject to the jurisdiction of the Interstate Commerce Commission.

II

Defendant further avers that on or about the 3rd day of November, 1923, at Navojoa, State of Sonora, Republic of Mexico, said Southern Pacific Railroad Company of Mexico received from one A. Von Borstel, (subject to the classification, Mexican tariff, Mexican laws and railway regulations hereinafter mentioned) 1,000 sacks of Cow Peas loaded in car S. P. No. 23993 consigned to Lewis-Simas-Jones Co., San Francisco, California, U. S. A., and thereupon issued an Export Bill of Lading (Conocimiento de Exportacion), a copy of which, together with a true and correct translation thereof from Spanish into the English language, is hereto annexed and marked exhibits "A" and "B" respectively, and hereby made a part of this answer.

Defendant avers that on the 13th day of November, 1923, at Navojoa, State of Sonora, Republic of Mexico, the said Southern Pacific Railroad Company of Mexico received from one Agustin Von Borstel, (subject to the classification, Mexican tariff, Mexican laws and railway regula- [fol. 14] tions hereinafter mentioned) 985 sacks of Cow Peas loaded in car G. H. & S. A. 36042 and consigned to Lewis-Simas-Jones Company, New Orleans, State of Louisiana, U. S. A., and issued therefor its Export Bill of Lading (Conocimiento de Exportacion), a copy of which, together with a true and correct translation thereof from the Spanish into the English language, is hereto annexed and marked exhibits "C" and "D" respectively.

Defendant avers that on the 24th day of November, 1923, at Navojoa, State of Sonora, Republic of Mexico, said Southern Pacific Railroad Company of Mexico received from Agencia Comercial del Mayo, (subject to the classification, Mexican tariff, Mexican laws and railway regulations hereinafter mentioned) 840 sacks of Cow Peas loaded in car S. P. 84996, consigned to Lewis-Simas-Jones Company (Gibraltar Warehouse), at San Francisco, State of California, U. S. A., and issued therefor its export Bill of Lading (Conocimiento de Exportacion), a true copy of which, together with a true and correct translation thereof from the Spanish into the English language, is annexed hereto and marked exhibits "E" and "F" respectively, and hereby made a part of this answer.

Said defendant further avers that the contents of said car G. H. & S. A. 36042, were transferred at Nogales, [fol. 15] Arizona, to S. P. 67458 and, on or about November 19, 1923, was, upon order of the plaintiff herein, diverted to the same consignee at San Francisco, California. That said three carloads of Cow Peas are the same three carloads mentioned in paragraph III of the complaint and in the report of the Interstate Commerce Commission in its Docket No. 16183, reported 102 I. C. C. Reports, page 245.

III

Said defendant further avers that at all times herein mentioned, the said Southern Pacific Railroad Company of Mexico, pursuant to the laws and railway regulations of the Republic of Mexico, duly published and filed with the Department of Communications and Public Works of the Republic of Mexico, a freight tariff naming a joint through rate on Cow Peas, carloads, from Navojoa, State of Sonora, Republic of Mexico, to San Francisco, State of California, U. S. A., of $1.33 per 100 pounds United States currency.

Said defendant further avers that at all times herein mentioned, and under and by virtue of the laws and railway regulations of the Republic of Mexico, said Southern Pacific Railroad Company of Mexico was forbidden, under severe penalties, from refunding any portion of its pub- [fol. 16] lished tariff rates without the previous consent of the Department of Communications and Public Works of

the Republic of Mexico. Defendant avers that said Department of Communications and Public Works has not consented to or authorized a departure from the lawful tariff rates on any of the shipments above mentioned, nor has said department consented to the refund of any part of the freight charges mentioned in the complaint herein.

IV

Said defendant further avers that under and by virtue of its divisional agreement with the Southern Pacific Railroad Company of Mexico, and prior to July 31, 1924, this defendant paid to said Southern Pacific Railroad Company of Mexico 63.175 cents per 100 pounds as its proportion of said through rate, leaving this defendant the sum of 69.825 cents per 100 pounds as its proportion of the through rate.

V

Defendant avers that the order of the Interstate Commerce Commission referred to in paragraph V of said complaint is unjust, unreasonable, inequitable and contrary to law, in that it purports to require this defendant to refund to the plaintiff the difference between the lawful [fol. 17] joint through rate charged, to wit: $1.33 per 100 pounds and an unpublished joint through rate of 94 cents per 100 pounds subsequently purported to have been found reasonable by the Interstate Commerce Commission from Navojoa, State of Sonora, Republic of Mexico, to San Francisco, State of California, United States of America. Defendant further avers that said order of the Interstate Commerce Commission is nugatory and void for want of jurisdiction of the subject matter by said Commission; and if enforced by judgment of this court, will take the property of this defendant without due process of law, in violation of the provisions of Section 13 of Article I of the Constitution of the State of California, and the Fifth and Fourteenth Amendments to the Constitution of the United States.

VI

Answering paragraph VI of said complaint, this defendant admits that no part of the sum of $1,122.72, or any

interest thereon has been paid, but denies that the whole or any part thereof is now due or owing by defendant to the plaintiff.

Second Defense

For a further and separate answer, defendant avers that the court has no jurisdiction of the subject matter of the [fols. 18 & 19] action in that it appears from the face of the complaint that the Interstate Commerce Commission had no jurisdiction to order this defendant to pay any reparation or damages on the ground of the purported unreasonableness of a lawful joint through rate assessed and collected on shipments originating on a connecting line of railroad in the Republic of Mexico, destined to a point in the United States, and transported on a through Bill of Lading.

Wherefore defendant prays that plaintiff take nothing by its complaint herein, and that defendant have judgment for its costs.

F. W. Mielke, Albert L. Whittle, James E. Lyons, Attorneys for Defendant, Southern Pacific Building, 65 Market Street, San Francisco, California.

Duly sworn to by G. L. King. Jurat omitted in printing.

(Here follows Exhibit "A" to Answer, side folios 19-a and 19-b)

EXHIBIT "A" TO ANSWER - Page 1.

Forma 10060 (Revisada)

FERROCARRIL SUD-PACIFICO DE MEXICO.

RUTA DE LA COSTA OCCIDENTAL

CONOCIMIENTO DE EXPORTACION
EXPORT BILL OF LADING

Navojoa
Nov 3- 1923

SELLO DE LA ESTACION

Núm. del Remitente ..... Núm. del Agente .....

RECIBIDO el dia 2 de Noviembre de 1923 con sujecion a la clasificación y tarifas en vigor en la fecha de la expedición de este conocimiento.

En la Estación Navojoa Son de A. Von Borstel

la carga que se describe en seguida, en aparente buen estado, con las observaciones anotadas, ignorándose el estado del contenido en los bultos; marcada, consignada y destinada según se indica a continuación y la que esta Empresa conviene en transportar al punto de destino siempre que éste estuviere situado en la linea, de otra manera la entregará a otro porteador para ser transportada a dicho punto de destino. Queda convenido mutuamente que todo servicio de transportación estará sujeto a las Leyes y Reglamentos ferroviarios y a todas las condiciones contenidas en el presente documento.

Consignada a Lewis Simas Jones Co.

Destino San Francisco Cal (Gibraltar Wesco) Estado de California EUA

Vía SP Co. Inicial y Núm. del carro SP 23993

Imp. Arrendaño, S. A. 1925

Núms. y Marcas por separado	Núm. de bultos	Naturaleza de los bultos	DESCRIPCION DE LA CARGA	Clase	Pesos sujetos a corrección
L.S.J.	1000	Sacos	Cow Peas (Frijol Ojo Negro)		50.500 Ks
			S L & C.		
			C/o Manuel F. Gonzalez		
			Nogales Son.		

Clase	Kilogramos		Cuota por 1.000 kilogramos	Cantidad	
D-1					
1½-1					
1					
2					
3					
4					
5					
6					
7					
8					
9					
10					
11					
12					
EXTRA					

Importe total de Flete .....

Gastos adelantados por cuenta de .....

Carga y descarga .....

Timbres .....

TOTAL ¿Por cobrar o pagado?

FLETES Y GASTOS

El importe de los fletes y gastos se pagará anticipadamente, a juicio de la Compañía e invariablemente lo será cuando las mercancías sujetas a transportación sean de poco valor o susceptibles de descomposición en todo o parte; e igualmente cuando la carga vaya destinada a estaciones donde no haya Agente.

En las cuentas de fletes no se comprenderán gastos aduanales ni de comisión en las fronteras y puertos de salida, ni los que llegare a causar la mercancía en su tránsito o en su llegada al lugar de su destino.

Tanto el importe de los fletes, como los gastos que llegare a hacer la Compañía, deberán quedar cubiertos previamente a la entrega de la carga al consignatario y estarán sujetos a rectificación.

Estación de .....

Fecha .....

Recibí la carga que aquí se describe en buen estado aparente, o en las condiciones que se hacen notar. Por el consignatario o dueño de la carga.

Received the freight herein described in apparent good order or in the condition herein noted for the consignee or owner or freight.

..... CONSIGNATARIO / CONSIGNEE

Esta carga sometida a exportación estará sujeta a todas las condiciones que aparezcan en los conocimientos de los porteadores que intervengan en su manejo y las condiciones de que habla el presente conocimiento, dejarán de tener efecto en cuanto difiera de aquí.

CONOCIMIENTO DE EXPORTACION
EXPORT BILL OF LADING

Núm. del Remitente ..... Núm. del Agente ..... SELLO DE LA ESTACION

RECIBIDO el día 2 de Noviembre de 1923, con sujecion a la clasificación y tarifas en vigor en la fecha de la expedición de este conocimiento.

En la Estación Navojoa Son de A. Von Borstel

la carga que se describe en seguida, en aparente buen estado, con las observaciones anotadas, ignorándose el estado del contenido en los bultos; marcada, consignada y destinada según se indica a continuación y la que esta Empresa conviene en transportar al punto de destino siempre que éste estuviere situado en la línea, de otra manera la entregará a otro porteador para ser transportada a dicho punto de destino. Queda convenido mutuamente que todo servicio de transportación estará sujeto a las Leyes y Reglamentos ferroviarios y a todas las condiciones contenidas en el presente documento.

Consignada a Lewis Simas Jones Co.

Destino San Francisco Cal. (Gibraltar Wesado de California EUA

Vía SP Co. Inicial y Núm. del carro SP 23993

Imp. Arvedaño, S. A. 1923

Núms. y Marcas por separado	Núm. de bultos	Naturaleza de los bultos	DESCRIPCION DE LA CARGA	Clase	Peso sujetos a corrección
L.S.J.	1000	Sacos	Cow Peas (Frijol Ojo Negro)		50.500 Ks
			S L & C.		
			C/o Manuel F. Gonzalez		
			Nogales Son.		

Clase	Kilogramos		Cuota por 1,000 kilogramos	Cantidad	
D-1			17/5/26		
1½-1					
1					
2	0		9		
3					
4			16		
5	5				
6					
7					
8					
9					
10					
11					
12					
Extra					

Importe total de Flete .....

Gastos adelantados por cuenta de .....

Carga y descarga .....

Timbres .....

TOTAL ¿Por cobrar o pagado?

FLETES Y GASTOS

El importe de los fletes y gastos se pagará anticipadamente, a juicio de la Compañía e invariablemente lo será cuando las mercancías sujetas a transportación sean de poco valor o susceptibles de descomposición en todo o parte; e igualmente cuando la carga vaya destinada a estaciones donde no haya Agente.

En las cuentas de fletes no se comprenderán gastos aduanales ni de comisión en las fronteras y puertos de salida, ni los que llegare a causar la mercancía en su tránsito o en su llegada al lugar de su destino.

Tanto el importe de los fletes, como los gastos que llegare a hacer la Compañía, deberán quedar cubiertos previamente a la entrega de la carga al consignatario y estarán sujetos a rectificación.

Estación de .....

Fecha .....

Recibí la carga que aquí se describe en buen estado aparente, o en las condiciones que se hacen notar. Por el consignatario o dueño de la carga.

Received the freight herein described in apparent good order or in the condition herein noted for the consignee or owner or eight.

..... CONSIGNATARIO / CONSIGNEE

Esta carga sometida a exportación estará sujeta a todas las condiciones que aparezcan en los conocimientos de los portedores que intervengan en su manejo y las condiciones de que habla el presente conocimiento, dejarán de tener efecto en cuanto difiera de aquellas condiciones y que se relacione con los actos de dichos porteadores.

This shipment, when exported, in subject to all conditions shown on bills of lading of participating carriers, and the conditions appearing on this bill of lading are without effect when differing from those shown or other carrier's bills of lading relative to acts on the part of said carriers.

A. Von Borstel. ..... (REMITENTE / CONSIGNOR

H. Navarro. ..... JEFE DE ESTACION / AGENT

Este documento no lleva los timbres correspondientes, por estar satisfecho su importe en virtud del contrato celebrado para ello con la Secretaría de Hacienda.

19-a

10-8

CONDICIONES:

1.—El remitente deberá dar a la Compañía con toda oportunidad los documentos necesarios que permitan el libre tránsito y entrega de las mercancías en el lugar de su destino; siendo por cuenta de aquél los comisos, multas y demás penas que impongan las autoridades por la falta de tales documentos, e indemnizará a la Compañía de los perjuicios que se le causen por el motivo indicado.

2.—Al expresarse el peso de la mercancía, la fracción menor de 10 kilogramos deberá considerarse como de 10 kilogramos completos y ningún flete podrá ser menor de 50 centavos, cualesquiera que sean la cantidad de la carga transportada y la distancia recorrida.

3.—Siempre que un bulto contenga mercancías clasificadas en las tarifas con cuotas de fletes diferentes, servirá de tipo para fijar a toda la carga, el que corresponda a la mercancía que tenga el tipo más elevado.

4.—La declaración hecha en este conocimiento acerca de la naturaleza y estado de los efectos que deban ser transportados, será la única que sirva de base en las cuestiones que se susciten entre el remitente que hace la declaración y la Empresa; reservándose ésta, sin embargo, el derecho de rectificar la declaración del remitente, exigiendo de éste la apertura y reconocimiento de los bultos que contengan las mercancías en el acto de su recepción. La Compañía queda relevada de responsabilidad por las averías que ocurran o por cualquiera otra causa, en caso de falsedad cometida en la declaración; sin perjuicio de que el remitente, o en su defecto, el consignatario, sean obligados a pagar la diferencia de portes y los daños y perjuicios; reservándose la propia Compañía las demás acciones a que tenga derecho.

5.—Los fletes y gastos por carga sujeta a transportación, podrá rectificarlos en todo tiempo la Compañía y el remitente o el consignatario sólo podrán hacerlo en el acto del recibo de la carga en su destino.

6.—El remitente podrá variar el punto de destino de la mercancía interín ésta no haya llegado a su destino, así como la persona del consignatario mientras que aquélla no se haya puesto a disposición de éste; pero en ambos casos será condición precisa la de que al pedir estos cambios se devuelva el conocimiento, haciendo constar en el mismo, el remitente, con su firma, que queda anulado este documento y no de otra manera. En este caso, el remitente tendrá la obligación de pagar los gastos que por esta operación se ocasionen a la Compañía.

7.—Una vez puesta la mercancía por esta Empresa a disposición del consignatario, el remitente no tendrá ya derecho alguno sobre la propia mercancía, la cual pertenece al consignatario.

8.—Los bultos que contengan las mercancías deberán llevar el nombre y dirección del consignatario y serán sellados cuando así lo exija la Compañía. Si intervinieren Agentes Aduanales extraños al servicio de la Compañía, señalados por el remitente para el manejo de la carga en las Aduanas o Agencias Fiscales, los bultos que contengan las mercancías deberán sellarse por dichos Agentes y la falta de esto eximirá a la Compañía de toda responsabilidad en la pérdida o menoscabo de la mercancía. Efectuada la descarga en el lugar de su destino, las mercancías quedarán a riesgo de su dueño.

9.—El consignatario inquirirá el arribo de la carga en el lugar de su destino; teniendo la obligación de retirarla dentro de 48 horas y dentro de 24 si los efectos son susceptibles de perderse o averiarse. En este último caso, pasado dicho plazo de 24 horas sin haberse retirado, serán vendidos desde luego, de conformidad con lo dispuesto por el Artículo 164 del Reglamento General de Ferrocarriles.

10.—La Empresa no será responsable de la pérdida, robo, destrucción o avería, total o parcial que sufran las mercancías sujetas a transportación en los trenes o estaciones, ya procedan de caso fortuito o fuerza mayor, o ya de actos de fuerza armada o de personas que no estén al servicio de la Compañía. Igualmente no será responsable por la pérdida, desfalco o avería de las mercancías en todo o en parte, por defecto o vicio propios de las mismas, no por roturas o mermas; así como tampoco de las averías o extravíos de las mercancías cargadas por los remitentes en carros puestos a su disposición cuidados por los mismos; entendiéndose que en este último caso y aún cuando no haya sido cuidada, para presentar cualquiera reclamación, tendrá que próbar que la avería o extravío tuvo lugar en el tránsito y que es imputable a la Compañía.

11.—En caso de extravío de bultos de equipaje entregados como mercancías, para que se conduzcan en trenes de carga y siempre que estén anotados en este documento, la Compañía, en caso de responsabilidad, se obliga a pagar como indemnización hasta $50.00 por baúles o petacas grandes y hasta $10.00 por cualquier otro bulto.

12.—En caso de pérdida, desfalco o avería, en todo o en parte, que sufran las mercancías entregadas a la Compañía para su transportación, ya procedan de incendio, robo o por cualquier otra causa que pudiera imputarse a la misma Compañía, la responsabilidad de ésta quedará extinguida cuando se trate de pérdida total, abonando al reclamante el costo original de la mercancía y la devolución del flete pagado y en caso de desfalco o avería, se abonará solamente el importe del menosprecio o demérito de la mercancía, en atención a su costo original y la porción del flete que corresponda. A este fin, la persona que haga su reclamación deberá presentarla dentro del término de 30 días contados de la fecha en que haya tenido lugar la pérdida, desfalco o avería; acompañando el conocimiento con la anotación de pérdida o daño, puesta por el Agente de Estación del lugar de su destino y de los demás justificantes que acrediten la responsabilidad de la Compañía. Pasado ese término no se aceptará ninguna reclamación y al efecto, el remitente o la persona que haga esas veces, renuncia a favor de la Compañía el término que señala la fracción II del artículo 592 y III de 1043 del Código de Comercio.

13.—Los fletes y gastos sobre toda carga consignada a Estaciones que no tengan Agente, se pagarán adelantados y los efectos se entregarán solamente a su dueño o a su Agente autorizado, previa entrega del conocimiento debidamente fechado y con el acúse de recibo. En caso de que no se encuentre el dueño en la estación listo para recibir la carga, será llevada a la estación siguiente en donde haya Agente y se entregará allí previo pago del correspondiente cargo adicional.

14.—Si la mercancía no se retirase de los almacenes de la Empresa, dentro de las 48 horas siguientes a su arribo, causará el pago de almacenaje y si durase en ellos el término de 90 días y dentro de dicho término nadie la reclama en debida forma, podrá la Compañía ponerla a disposición judicial para su venta, a fin de reembolsarse del flete y demás gastos para su conducción.

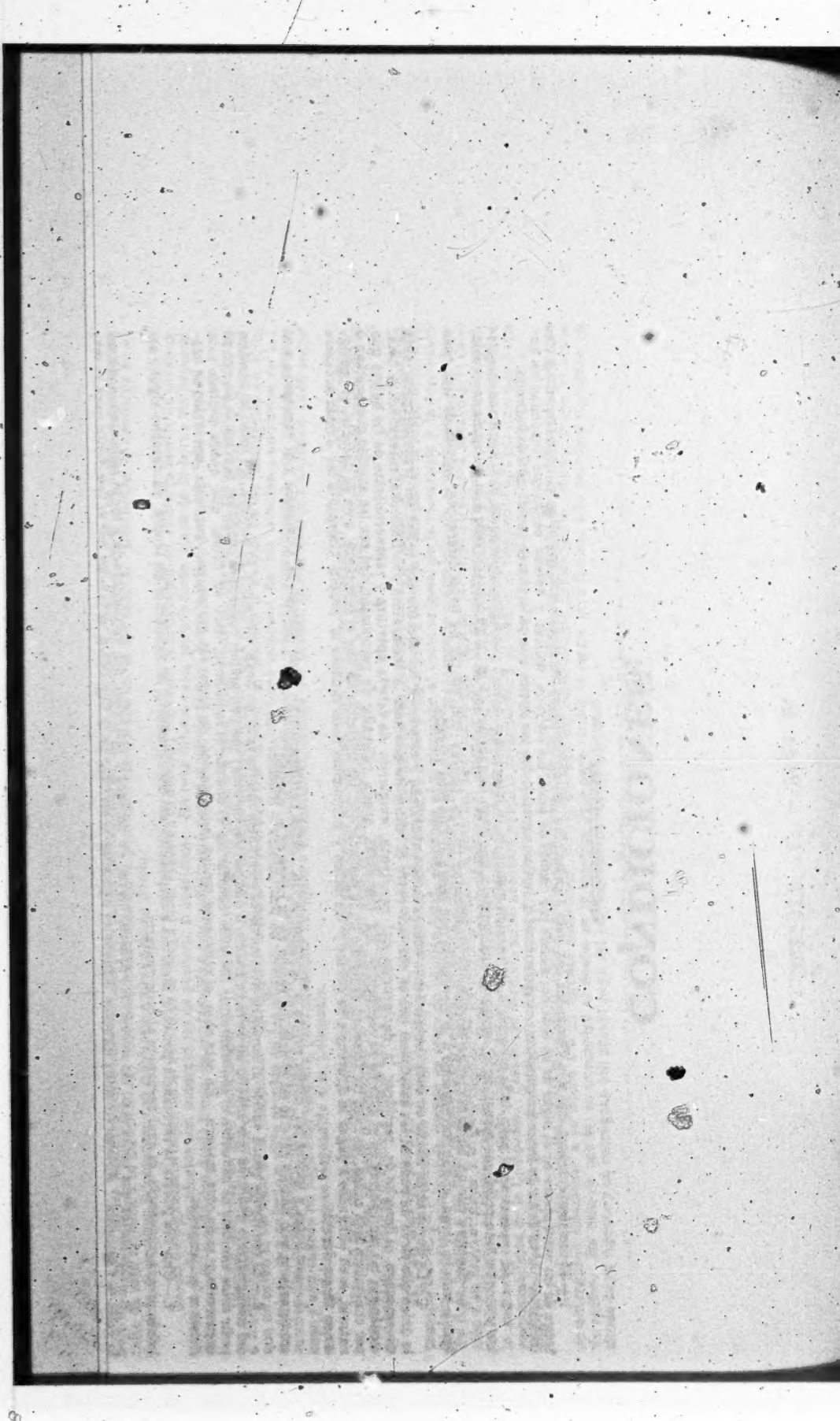
15.—En caso de que este conocimiento ampare mercancías consignadas a algún punto que no comprendan las líneas de esta Compañía, la responsabilidad de ésta cesa en el momento que las entrega al porteador que haya de continuar el transporte y a este efecto el remitente está conforme en entenderse con el nuevo porteador y renuncia los beneficios que le concede el artículo 577 del Código de Comercio.

16.—Cuando la carga deba de venderse, como lo expresan los puntos 9 y 14 y el producto de su venta no alcance a cubrir el importe de fletes y gastos que adeudare, o bien cuando la Compañía tuviere que hacer reclamaciones por el pago de fletes y gastos o por rectificación de los mismos que hubieren pagado, tendrá derecho a exijir las cantidades pendientes de pago, bien del porteador de quien haya recibido la carga, bien del primer remitente, o bien del consignatario, a su elección.

17.—Para la mayor firmeza y validez de las condiciones que en este documento se expresan, el remitente declara que expresamente renuncia el derecho que le conceden las fracciones IV, VI, VIII y X del artículo 590 del Código de Comercio.

18.—Cuando la carga se sitúe por el consignador en carro puesto a su disposición, la Compañía cobrará doble tipo de flete por la carga que exceda de diez por ciento (10%) de la capacidad marcada en el carro.

10-b



[fol. 20] EXHIBIT B TO ANSWER

Southern Pacific Railroad of Mexico, West Coast Route

Export Bill of Lading

Number of the Shipper: ——. No. of the Agent: ——.

Stamp of the Station: Navojoa, Nov. 3, 1923.

Received the 2nd day of November, 1923, subject to the classification and tariffs in force on the date of the issuing of this bill of lading, at the Station Navojoa, Son., from A. Von Borstel, the freight which is described immediately following in apparent good order, with the notations thereon, ignoring the condition of the contents in the packages; marked consigned and destined according to how it is indicated hereinafter and which this Enterprise agrees to transport to the point of destination, providing this said point is situated on the line, otherwise it will be delivered to another participating carrier to be transported to said point of destination. It is hereby mutually agreed that all transportation service shall be subject to the laws and railway regulations and to all of the conditions contained in the present document.

Consigned to Lewis Simas Jones Co.

Destination: San Francisco, Cal. (Gibraltar West), *California*, U. S. A.

Initial and number of the car: S.P.: 23993.

Via: S.P. Co.

[fol. 21]

No. & marks separately	No. of packages	Nature of packages	Description of the freight (shipment)	Class	Weights, subject to correction
L. S. J	1000	Sacks	Cow Peas (Frijol ojo Negro).	.....	50.500 Ks. (Kilograms)

S L & C., C/o Manuel F. Gonzalez, Nogales, Son.

Class	Rate, kilograms per 1000 kilograms	Amount or sum
D-1	.....	.....
1½-1	.....	.....
1	.....	.....
2	.....	.....
3	.....	.....
4	.....	.....
5	.....	.....
6	.....	.....
7	.....	.....
8	.....	.....
9	.....	.....
10	.....	.....
11	.....	.....
12	.....	.....
(Special)	.....	.....

Freight and expenses

The amount or value of the freight and expenses shall be paid in advance within the discretion of the Company and this shall be invariably when the merchandise or goods subject to transportation are of little value or susceptible to decomposition in all or in part and equally so when the freight is destined to stations where there is no agent.

In the freight accounts will not be included custom house nor commission charges at the frontier and ports of departure, nor what the merchandise would happen to occasion in its transit or on its arrival at the place of destination.

The amount or value of the freights, as well as the expenses that the company may happen to incur should be covered previous to the delivery of the freight to the consignee and shall be subject to rectification.

[fol. 22] Station of ——, Date: —— —, ——.

Total amount of freight: ——.

Expenses advanced for account of: ——.

Loading and Unloading: ——.

Revenue Stamps: ——.

Total to collect or paid: ——.

Received the freight herein described in apparent good order or in the condition herein noted for the consignee or owner of the freight. —— —— (Consignee).

This freight (or shipment) when submitted to exportation shall be subject to all of the conditions shown on bills of lading of participating carriers and the conditions appearing on this bill of lading are without effect, when differing from those shown on other carriers' bills of lading relative to acts on the part of said carriers.

A. Von Borstel (Consignor). H. Navarro (Station Agent).

This document does not carry thereon the corresponding revenue stamps, as the amount thereof has been fully satisfied by virtue of the contract entered into concerning same with the Secretary of Treasurer or Finance.

Conditions

1. The shipper shall deliver to the Company with due diligence the necessary documents that will permit the free transit and delivery of the merchandise at the place of its destination; the seizure or confiscation, fines or other penalties that may be imposed by the authorities for the lack of such documents being charged to his account and he shall indemnify the Company for the damages that may be caused to the same for the reason indicated.

2. In expressing the weight of the merchandise, the fraction less than 10 kilograms shall be considered as that of [fol. 23] ten kilograms complete and no freight can be less than 50 centavos (Translator's note: 50 centavos is equivalent to 25 cents American money) whatever may be the quantity of the merchandise transported and the distance covered.

3. Whenever a package contains classified goods in the tariffs with different freight rates, it shall serve as a type to fix to all of the load that which corresponds to the merchandise that has or bears the highest rate.

4. The statement made in this bill of lading concerning the nature and condition of the effects which should be transported will be the only one which shall serve as a basis in the question which may arise between the shipper who makes the statement or declaration and the Enterprise; the latter reserving, however, the right of correcting the declaration of the shipper exacting from him the opening and examination of the packages that contain the merchandise in the act of its reception or receipt. The Company remains relieved of responsibility for the damages that may occur or for any other cause, in case of falsehood committed in the declaration; without prejudice that the shipper or in his absence, the consignee shall be obliged to pay the difference in freight rates and the damages and prejudices [fol. 24] the Company itself reserving its right to all the other actions or suits.

5. The freight rates and the expenses for freight subject to transporation can be rectified at any time by the Company and the shipper or the consignee can only do so upon the act of the receipt of the freight at destination.

6. The shipper can change the point of destination of the merchandise while the same has not arrived at its destination as likewise the person of the consignee while it has not been placed at the disposition of the latter; but in either case it will be a precise condition that upon the request of these changes, the bill of lading be returned, the shipper causing to be inscribed therein with his signature that this document remains nullified and not in another manner. In this case the shipper shall be obliged to pay the expenses that because of this operation are incurred by the Company.

7. Once the merchandise has been placed by this Enterprise at the disposition of the consignee, the shipper will then have no right whatever upon the merchandise itself, which belongs to the consignee.

8. The packages that contain the merchandise shall bear thereon the name and address of the consignee and they [fol. 25] shall be sealed when thus exacted by the Company. If custom house agents foreign to the service of the Company should intervene, designated by the shipper for the handling of the freight at the custom houses or fiscal agencies, the bundles that contain the merchandise shall be sealed by said agents and the lack of this shall exempt the Company from all responsibility in the loss or deterioration of the merchandise. The unloading of same having been effected at the place of its destination, the goods shall remain at the risk of the owner.

9. The consignee shall inquire as to the arrival of the freight at the place of its destination, having the obligation of removing same within 48 hours and within 24 hours if the effects are susceptible of perishing or damage. In this latter case the period of 24 hours having elapsed without being removed, they shall be sold at once, in conformity with the proviso of Article 164 of the General Railway By-Laws. (Trans. note: Railway Rules and Regulations.)

10. The Enterprise will not be responsible for the loss, theft, destruction or damage, total or partial, suffered by

the merchandise subject to transportation on the trains or stations, whether though the same shall proceed or emanate through a fortuitous case or superior force, or through acts [fol. 26] of an armed force or of persons who may not be at the service of the Company, equally so it will not be responsible for the loss, defalcation or damage of the merchandise in all or in part, through defect or vices belonging properly to the same, nor for breakage or shrinkage and likewise neither for the damages or deviations of the merchandise loaded by the shippers in cars placed at their disposition cared for by the same; it being understood that in this latter case and even when it has not been cared for in order to present any claim, he will have to prove that the damage or deviation (going astray) took place in transit and that it is chargeable or imputable to the Company.

11. In case of the going astray of baggage packages delivered as merchandise in order to be conducted on freight trains and providing that these packages are noted in this document, the Company, in case of responsibility, obligates itself to pay as indemnification up to $50.00 (Mexican ½ U. S. money) for trunks or large grips and up to $15 (Mexican) for any other bundles.

12. In case of loss, defalcation or damage in all or in part suffered by the merchandise delivered to the Company for its transportation, whether same be due to fire, theft or for any other cause that could be imputed to the same Com- [fol. 27] pany the responsibility of the latter shall be extinguished when a total loss is involved and crediting to the claimant the original cost of the goods and the return of the freight paid and in case of defalcation or damage, there shall be credited only the amount of the diminution or depreciation of the merchandise determined by its original cost and that portion of the freight rate that may correspond to it. For this purpose the person who makes these claims should present it within the period of 30 days counted from the time or date in which the loss took place, defalcation or damage, accompanying the bill of lading with the notation of loss or damage, placed thereon by the agent of the station (station agent) of the place of its destination and of the other justifications that accredit the responsibility of the Company. After the lapse of this time, no claim shall be accepted and in effect, the shipper

or the person that takes such steps renounces in favor of the Company the term of time that fraction II of Article 592 and III of 1043 of the Commercial Code designates.

13. The freight rates and expenses upon all freight consigned to stations that have no agents, shall be paid in advance and the effects or goods shall be delivered only to their owner or to the authorized Agent, upon the previous delivery of the bill of lading duly dated and with acknowl- [fol. 28] ment of receipt thereon. In case that the owner is not found at the Station ready to receive the freight, it shall be taken to the following station where there is an agent and it shall be delivered there upon the previous payment of a corresponding additional charge.

14. If the merchandise is not withdrawn from the warehouses of the Enterprise within the 48 hours following its arrival, it will occasion the payment of storage and if it should remain in them for a period of 90 days and if within that time no one claims the same in due form, the Company can place the same at judicial disposition for its sale to the end or for the purpose of reimbursing itself the freight and other expenses incidental to its conduction.

15. In case that this bill of lading pertains to merchandise consigned to some point not within the lines of this Company, the responsibility of this Company ceases at the moment that same are delivered to the participating carrier who shall have to continue the transportation and for this purpose or effect the shipper hereby agrees to come to an understanding with the new participating carrier and renounces or waives the benefits conceded to him by Article 577 of the Commercial Code.

16. When the freight should be sold as expressed or provided by clauses 9 and 14 and the product of its sale [fol. 29] does not reach the figure high enough to cover the amount of the freight and other charges that may be due the same, or on the other hand when the Company should have to demand or cause to make demands for the payment of freight rates and expenses or for the rectification of the same that they may have paid, it shall have the right to demand the outstanding accounts of payment, either from the participating carrier from whom he may

have received the freight either from the first shipper or either from the consignee, at its election.

17. For the greater firmness and validity of the conditions that are expressed in this document, the shipper declares that he expressly waives the right conceded to him by fractions IV, VI, VIII, and X of Article 590 of the Commercial Code.

18. When the freight is loaded by the consignor in a car placed at his disposal, the Company shall collect double the rate of freight for the load that exceeds (10%) ten per cent of the capacity marked on the car.

[fol. 30] STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Jose H. Alfonso, being first duly sworn, deposes and says: That he is a citizen of the United States and over the age of twenty one years; that he is by profession an interpreter and translator of the Spanish language into English and the English language into Spanish; with an office at Suite 316 No. 948 Market Street, Liberty Bank Building, in the aforesaid City and County and State;

That the translation of the Bill of Lading annexed hereto in Spanish, is a true and correct translation of said Spanish Bill of Lading of the Southern Pacific Railroad of Mexico, a true and correct translation of same into the English language and fully expresses the true and correct value thereof.

Jose H. Alfonso.

Subscribed and sworn to before me this 24th day of November, A. D. 1926. Lester Ball, Notary Public in and for the City and County of San Francisco, State of California. (Seal.)

(Here follows Exhibit "C" to Answer, side folios 30-a and 30-b)

EXHIBIT "C" TO ANSWER - Page 1

Forma 10060 (Revisada)

FERROCARRIL SUD-PACIFICO DE MEXICO.

RUTA DE LA COSTA OCCIDENTAL.

CONOCIMIENTO DE EXPORTACION
EXPORT BILL OF LADING

Navojoa
Nov 13-926

SELLO DE LA ESTACION

Núm. del Remitente ..... Núm. del Agente .....

RECIBIDO el día 13 de Noviembre de 192 3, con sujeción a la clasificación y tarifas en vigor en la fecha de la expedicion de este conocimiento.

En la Estación Navojoa Son Mex de Agustin Von Boratel

la carga que se describe en seguida, en aparente buen estado, con las observaciones anotadas, ignorandose el estado del contenido en los bultos; marcada, consignada y destinada segun se indica a continuación y la que esta Empresa conviene en transportar al punto de destino siempre que este estuviere situado en la línea, de otra manera la entregará a otro porteador para ser transportada a dicho punto de destino. Queda convenido mutuamente que todo servicio de transportación estará sujeto a las Leyes y Reglamentos ferroviarios y a todas las condiciones contenidas en el presente documento.

Consignada a Lewis Simas Jones Company

Destino New Orleans Estado de Luissiana USA

Vía SPM- SP Co GHSA Sunset Inicial y Núm. del carro GHSA 36042

Imp. Avendaño, S. A.—1925

Núms. y Marcas por separado	Núm. de bultos	Naturaleza de los bultos	DESCRIPCION DE LA CARGA	Clase	Pesos sujetos a corrección
I.S.J.	985	Sacos	Cow Peas (Frijol Ojo Negro) con		39400 Ks
Cow Peas 88 Lbs Net			40 Kilos neto c/u		
			S L & C		
			Flte a cobrar.		
			C/o Manuel F. Gonzalez.		
			Nogales Son.		

Clase	Kilogramos		Cuota por 1,000 kilogramos		Cantidad	
D-1						
1A 1						
1						
2						
3						
4						
5						
6						
7						
8						
9						
10						
11						
12						
UNEX						

Importe total de Flete .....

Gastos adelantados por cuenta de .....

Carga y descarga .....

Timbres .....

TOTAL. ¿Por cobrar o pagado? .....

FLETES Y GASTOS

El importe de los fletes y gastos se pagará anticipadamente, a juicio de la Compañía e invariablemente lo será cuando las mercancías sujetas a transportación sean de poco valor o susceptibles de descomposición en todo o parte; o igualmente cuando la carga vaya destinada a estaciones donde no haya Agente.

En las cuentas de fletes no se comprenderán gastos aduánales ni de comisión en las fronteras y puertos de salida, ni los que llegare a causar la mercancía en su tránsito o en su llegada al lugar de su destino.

Tanto el importe de los fletes, como los gastos que llegare a hacer la Compañía, deberán quedar cubiertos previamente a la entrega de la carga al consignatario y estarán sujetos a rectificación.

Estacion de .....

Fecha .....

Recibí la carga que aquí se describe en buen estado aparente, o en las condiciones que se hacen notar. Por el consignatario o dueño de la carga.

Received the freight herein described in apparent good order or in the condition herein noted for the consignee or owner or freight.

..... (CONSIGNATARIO
) CONSIGNEE

Esta carga sometida a exportación estará sujeta a todas las condiciones que aparezcan en los conocimientos de los porteadores que intervengan en su manejo y las condiciones de que habla el presente conocimiento, dejarán de tener efecto en cuanto difiera de aque-

CONOCIMIENTO DE EXPORTACION
EXPORT BILL OF LADING

Núm. del Remitente ..... Núm. del Agente ..... SELLO DE LA ESTACION

RECIBIDO el dia 13 de Noviembre de 192 3, con sujeción a la clasificación y tarifas en vigor en la fecha de la expedicion de este conocimiento.

En la Estación Navojoa Son Mex de Agustin Von Borstel

la carga que se describe en seguida, en aparente buen estado, con las observaciones anotadas, ignorandose el estado del contenido en los bultos; marcada, consignada y destinada segun se indica a continuación y la que esta Empresa conviene en transportar al punto de destino siempre que este estuviere situado en la linea, de otra manera la entregará a otro porteador para ser transportada a dicho punto de destino. Queda convenido mutuamente que todo servicio de transportación estará sujeto a las Leyes y Reglamentos ferroviarios y a todas las condiciones contenidas en el presente documento.

Consignada a Lewis Simas Jones Company

Destino New Orleans Estado de Luisiana USA

Vía SPM- EP Co GHSA Sunset Inicial y Núm. del carro GHSA 36042

Imp. Avendaño, S. A.—mdo.

Nums. y Marcas por separado	Núm. de bultos	Naturaleza de los bultos	DESCRIPCION DE LA CARGA	Clase	Pesos sujetos a corrección
I.S.J.	985	Sacos	Cow Peas (Frijol Ojo Negro) con		39400 Ks
Cow Peas			40 Kilos neto c/u		
88 Lbs					
Net					
			S L & C		
			Flte a cobrar.		
		C/o	Manuel F. Gonzalez.		
			Nogales Son.		

Clase	Kilogramos		Cuota por 1,000 kilogramos		Cantidad	
D-1						
1¼ 1						
1						
2						
3						
4						
5						
6						
7						
8						
9						
10						
11						
12						
EXPLOS.						

Importe total de Flete .....

Gastos adelantados por cuenta de .....

Carga y descarga .....

Timbres .....

TOTAL. ¿Por cobrar o pagado? .....

FLETES Y GASTOS

El importe de los fletes y gastos se pagará anticipadamente, a juicio de la Compañía e invariablemente lo será cuando las mercancías sujetas a transportación sean de poco valor o susceptibles de descomposición en todo o parte; e igualmente cuando la carga vaya destinada a estaciones donde no haya Agente.

En las cuentas de fletes no se comprenderán gastos aduanales ni de comisión en las fronteras y puertos de salida, ni los que llegare a causar la mercancía en su tránsito o en su llegada al lugar de su destino.

Tanto el importe de los fletes, como los gastos que llegare a hacer la Compañía, deberán quedar cubiertos previamente a la entrega de la carga al consignatario y estarán sujetos a rectificación.

Estacion de .....

Fecha .....

Recibí la carga que aquí se describe en buen estado aparente, o en las condiciones que se hacen notar. Por el consignatario o dueño de la carga.

Received the freight herein described in apparent good order or in the condition herein noted for the consignee or owner or freight.

..... (CONSIGNATARIO / CONSIGNEE

Esta carga sometida a exportación estará sujeta a todas las condiciones que aparezcan en los conocimientos de los porteadores que intervengan en su manejo y las condiciones de que habla el presente conocimiento, dejarán de tener efecto en cuanto difiera de aquellas condiciones y que se relacione con los actos de dichos porteadores.

This shipment, when exported, is subject to all conditions shown on bills of lading of participating carriers, and the conditions appearing on this bill of lading are without effect when differing from those shown or other carrier's bills of lading relative to acts on the part of said carriers.

Por Agustin VonBorstel. REMITENTE / CONSIGNOR ..... H. Navarro. ..... (JEFE DE ESTACION / AGENT

J.A. Morales.

Este documento no lleva los timbres correspondientes, por estar satisfecho su importe en virtud del contrato celebrado para ello con la Secretaría de Hacienda.

30-a

18-8

CONDICIONES:

1.—El remitente deberá dar a la Compañía con toda oportunidad los documentos necesarios que permitan el libre tránsito y entrega de las mercancías en el lugar de su destino; siendo por cuenta de aquél los comisos, multas y demás penas que impongan las autoridades por la falta de tales documentos, e indemnizará a la Compañía de los perjuicios que se le causen por el motivo indicado.

2.—Al expresarse el peso de la mercancía, la fracción menor de 10 kilogramos deberá considerarse como de 10 kilogramos completos y ningún flete podrá ser menor de 50 centavos, cualesquiera que sean la cantidad de la carga transportada y la distancia recorrida.

3.—Siempre que un bulto contenga mercancías clasificadas en las tarifas con cuotas de fletes diferentes, servirá de tipo para fijar a toda la carga, el que corresponda a la mercancía que tenga el tipo más elevado.

4.—La declaración hecha en este conocimiento acerca de la naturaleza y estado de los efectos que deban ser transportados, será la única que sirva de base en las cuestiones que se susciten entre el remitente que hace la declaración y la Empresa; reservándose esta, sin embargo, el derecho de rectificar la declaración del remitente, exigiendo de éste la apertura y reconocimiento de los bultos que contengan las mercancías en el acto de su recepción. La Compañía queda relevada de responsabilidad por las averías que ocurran o por cualquiera otra causa, en caso de falsedad cometida en la declaración; sin perjuicio de que el remitente, o en su defecto, el consignatario, sean obligados a pagar la diferencia de portes y los daños y perjuicios; reservándose la propia Compañía las demás acciones a que tenga derecho.

5.—Los fletes y gastos por carga sujeta a transportación, podrá rectificarlos en todo tiempo la Compañía y el remitente o el consignatario sólo podrán hacerlo en el acto del recibo de la carga en su destino.

6.—El remitente podrá variar el punto de destino de la mercancía interin ésta no haya llegado a su destino, así como la persona del consignatario mientras que aquélla no se haya puesto a disposición de éste; pero en ambos casos será condición precisa la de que al pedir estos cambios se devuelva el conocimiento, haciendo constar en el mismo, el remitente, con su firma, que queda anulado este documento y no de otra manera. En este caso, el remitente tendrá la obligación de pagar los gastos que por esta operación se ocasionen a la Compañía.

7.—Una vez puesta la mercancía por esta Empresa a disposición del consignatario, el remitente no tendrá ya derecho alguno sobre la propia mercancía, la cual pertenece al consignatario.

8.—Los bultos que contengan las mercancías deberán llevar el nombre y dirección del consignatario y serán sellados cuando así lo exija la Compañía. Si intervinieren Agentes Aduanales extraños al servicio de la Compañía, señalados por el remitente para el manejo de la carga en las Aduanas o Agencias Fiscales, los bultos que contengan las mercancías deberán sellarse por dichos Agentes y la falta de esto eximirá a la Compañía de toda responsabilidad en la pérdida o menoscabo de la mercancía. Efectuada la descarga en el lugar de su destino, las mercancías quedarán a riesgo de su dueño.

9.—El consignatario inquirirá el arribo de la carga en el lugar de su destino; teniendo la obligación de retirarla dentro de 48 horas y dentro de 24 si los efectos son susceptibles de perderse o averiarse. En este último caso, pasado dicho plazo de 24 horas sin haberse retirado, serán vendidos desde luego, de conformidad con lo dispuesto por el Artículo 164 del Reglamento General de Ferrocarriles.

10.—La Empresa no será responsable de la pérdida, robo, destrucción o avería, total o parcial que sufran las mercancías sujetas a transportación en los trenes o estaciones, ya procedan de caso fortuito o fuerza mayor, o ya de actos de fuerza armada o de personas que no estén al servicio de la Compañía. Igualmente no será responsable por la pérdida, desfalco o avería de las mercancías en todo o en parte, por defecto o vicio propios de las mismas, no por roturas o mermas; así como tampoco de las averías o extravíos de las mercancías cargadas por los remitentes en carros puestos a su disposición cuidados por los mismos; entendiéndose que en este último caso y aún cuando no haya sido cuidada, para presentar cualquiera reclamación, tendrá que probar que la avería o extravío tuvo lugar en el tránsito y que es imputable a la Compañía.

11.—En caso de extravío de bultos de equipaje entregados como mercancías, para que se conduzcan en trenes de carga y siempre que estén anotados en este documento, la Compañía, en caso de responsabilidad, se obliga a pagar como indemnización hasta $50.00 por baúles o petacas grandes y hasta $15.00 por cualquier otro bulto.

12.—En caso de pérdida, desfalco o avería, en todo o en parte, que sufran las mercancías entregadas a la Compañía para su transportación, ya procedan de incendio, robo o por cualquier otra causa que pudiera imputarse a la misma Compañía, la responsabilidad de esta quedará extinguida cuando se trate de pérdida total, abonando al reclamante el costo original de la mercancía y la devolución del flete pagado y en caso de desfalco o avería, se abonará solamente el importe del menosprecio o demérito de la mercancía, en atención a su costo original y la porción del flete que corresponda. A este fin, la persona que haga su reclamación deberá presentarla dentro del término de 30 días contados de la fecha en que haya tenido lugar la pérdida, desfalco o avería; acompañando el conocimiento con la anotación de pérdida o daño, puesta por el Agente de Estación del lugar de su destino y de los demás justificantes que acrediten la responsabilidad de la Compañía. Pasado ese término no se aceptará ninguna reclamación y al efecto, el remitente o la persona que haga sus veces, renuncia a favor de la Compañía el término que señala la fracción II del artículo 592 y III de 1043 del Código de Comercio.

13.—Los fletes y gastos sobre toda carga consignada a Estaciones que no tengan Agente, se pagarán adelantados y los efectos se entregarán solamente a su dueño o a su Agente autorizado, previa entrega del conocimiento debidamente fechado y con el acuse de recibo. En caso de que no se encuentre el dueño en la estación listo para recibir la carga, será llevada a la estación siguiente en donde haya Agente y se entregará allí previo pago del correspondiente cargo adicional.

14.—Si la mercancía no se retirase de los almacenes de la Empresa, dentro de las 48 horas siguientes a su arribo, causará el pago de almacenaje y si durase en ellos el término de 90 días y dentro de dicho término nadie la reclama en debida forma, podrá la Compañía ponerla a disposición judicial para su venta, a fin de reembolsarse del flete y demás gastos para su conducción.

15.—En caso de que este conocimiento ampare mercancías consignadas a algún punto que no comprendan las líneas de esta Compañía, la responsabilidad de ésta cesa en el momento que las entrega al porteador que haya de continuar el transporte y a este efecto el remitente está conforme en entenderse con el nuevo porteador y renuncia los beneficios que le concede el artículo 577 del Código de Comercio.

16.—Cuando la carga deba de venderse, como lo expresan los puntos 9 y 14 y el producto de su venta no alcance a cubrir el importe de fletes y gastos que adeudare, o bien cuando la Compañía tuviere que hacer reclamaciones por el pago de fletes y gastos o por rectificación de los mismos que hubieren pagado, tendrá derecho a exijir las cantidades pendientes de pago, bien del porteador de quien haya recibido la carga, bien del primer remitente, o bien del consignatario, a su elección.

17.—Para la mayor firmeza y validez de las condiciones que en este documento se expresan, el remitente declara que expresamente renuncia el derecho que le conceden las fracciones IV, VI, VIII y X del artículo 590 del Código de Comercio.

18.—Cuando la carga se sitúe por el consignador en carro puesto a su disposición, la Compañía cobrará doble tipo de flete por la carga que exceda de diez por ciento (10%) de la capacidad marcada en el carro.

18-b

30-b

[fol. 31] EXHIBIT D TO ANSWER

Southern Pacific Railroad of Mexico, West Coast Route

Export Bill of Lading

Number of the Shipper: ——. No. of the Agent: ——.

Stamp of the Station: Navojoa, Nov. 13, -926.

Received the 13th day of November, 1923, subject to the classification and tariffs in force on the date of the issuing of this bill of lading, at the Station Navojoa, Son., Mex., from Augustin Von Borstel, the freight which is described immediately following in apparent good order, with the notations thereon, ignoring the condition of the contents in the packages; marked consigned and destined according to how it is indicated hereinafter and which this Enterprise agrees to transport to the point of destination, providing this said point is situated on the line, otherwise it will be delivered to another participating carrier to be transported to said point of destination. It is hereby mutually agreed that all transportation service shall be subject to the laws and railway regulations and to all the conditions contained in the present document.

Consigned to: Lewis Simas Jones Company.

Destination: New Orleans, State of Louisiana, U. S. A.

Initial and number of the car: G.H.S.A. 36042.

Via: S.P.M.-S.P. Co., G.H.S.A. Sunset.

[fol. 32]

No. & marks separately	No. of packages	Nature of packages	Description of the freight (shipment)	Class	Weights, subject to correction
L. S. J. Cow Peas	985	Sacks	Cow Peas (Frijol ojo Negro) with 40 kilos each one net.	....	39400 Ks. (Kilograms).
88 lbs. Net.					

S L & C. Freight for Collection. c/o Manuel F. Gonzalez, Nogales, Son.

Class	Rate, kilograms per 1000 kilograms	Amount or sum	Freight and expenses
D-1	.....	.....	The amount or value of the
1½-1	.....	.....	freight and expenses shall be paid
1	.....	.....	in advance within the discretion
2	.....	.....	of the Company and this shall be
3	.....	.....	invariably when the merchandise
4	.....	.....	or goods subject to transportation
5	.....	.....	are of little value or susceptible

S L & C. Freight for Collection. c/o Manuel F. Gonzalez, Nogales, Son..

Class	Rate, kilograms per 1000 kilograms	Amount or sum	Freight and expenses
6	.....	.....	to decomposition in all or in part
7	.....	.....	and equally so when the freight
8	.....	.....	is destined to stations where there
9	.....	.....	is no agent.
10	.....	.....	In the freight accounts will not
11	.....	.....	be included custom house nor
12	.....	.....	commission charges at the fron-
(Special)	.....	.....	tier and ports of departure, nor what the merchandise would happen to occasion in its transit or on its arrival at the place of destination,

The amount or value of the freights, as well as the expenses that the company may happen to incur should be covered previous [fol. 33] to the delivery of the freight to the consignee and shall be subject to rectification.

Station of ——, Date: —— —, ——.

Total amount of freight: ——.

Expenses advanced for account of: ——.

Loading and Unloading: ——.

Revenue Stamps: ——.

Total to collect or paid: ——.

Received the freight herein described in apparent good order or in the condition herein noted for the consignee or owner of the freight.

—— —— (Consignee).

This freight (or shipment) when submitted to exportation shall be subject to all of the conditions shown on bills of lading of participating carriers and the conditions appearing on this bill of lading are without effect, when differing from those shown on other carriers' bills of lading relative to acts on the part of said carriers.

Agustin Von Borstel (Consignor), by J. A. Morales.

H. Navarro (Station Agent).

This document does not carry thereon the corresponding revenue stamps, as the amount thereof has been fully satisfied by virtue of the contract entered into concerning same with the Secretary of the Treasurer or Finance.

Conditions

1. The shipper shall deliver to the Company with due diligence the necessary documents that will permit the free transit and delivery of the merchandise at the place of its destination; the seizure or confiscation, fines or other penalties that may be imposed by the authorities for the lack of such documents being charged to his account and he shall indemnify the Company for the damages that may be [fol. 34] caused to the same for the reason indicated.

2. In expressing the weight of the merchandise, the fraction less than 10 kilograms shall be considered as that of ten kilograms complete and no freight can be less than 50 centavos (Translator's note: a centavo is equivalent to 25 cents American money) whatever may be the quantity of the merchandise transported and the distance covered.

3. Whenever a package contains classified goods in the tariffs with different freight rates, it shall serve as a type to fix to all of the load that which corresponds to the merchandise that has or bears the highest rate.

4. The statement made in this bill of lading concerning the nature and condition of the effects which should be transported will be the only one which shall serve as a basis in the questions which may arise between the shipper who makes the statement or declaration and the Enterprise; the latter reserving, however, the right of correcting the declaration of the shipper exacting from him the opening and examination of the packages that contain the merchandise in the act of its reception or receipt. The Company remains relieved of responsibility for the damages that may occur or for any other cause, in case of falsehood committed [fol. 35] in the declaration; without prejudice that the shipper or in his absence, the consignee shall be obliged to pay the difference in freight rates and the damages and prejudices the Company itself reserving its right to all the other actions or suits.

5. The freight rates and the expenses for freight subject to transportation can be rectified at any time by the Company and the shipper or the consignee can only do so upon the act of the receipt of the freight at destination.

6. The shipper can change the point of destination of the merchandise while the same has not arrived at its destination as likewise the person of the consignee while it has not been placed at the disposition of the latter; but in either case it will be a precise condition that upon the request of these changes, the bill of lading be returned, the shipper causing to be inscribed therein with his signature that this document remains nullified and not in another manner. In this case the shipper shall be obliged to pay the expenses that because of this operation are incurred by the Company.

7. Once the merchandise has been placed by this Enterprise at the disposition of the consignee, the shipper will [fol. 36] then have no right whatever upon the merchandise itself, which belongs to the consignee.

8. The packages that contain the merchandise shall bear thereon the name and address of the consignee and they shall be sealed when thus exacted by the Company. If custom house agents foreign to the service of the Company should intervene, designated by the shipper for the handling of the freight at the custom houses or fiscal agencies, the bundles that contain the merchandise shall be sealed by said agents and the lack of this shall exempt the Company from all responsibility in the loss or deterioration of the merchandise. The unloading of same having been effected at the place of its destination, the goods shall remain at the risk of the owner.

9. The consignee shall inquire as to the arrival of the freight at the place of its destination, having the obligation of removing same within 48 hours and within 24 hours if the effects are susceptible of perishing or damage. In this latter case the period of 24 hours having elapsed without being removed, they shall be sold at once, in conformity with the proviso of Article 164 of the General Railway By-Laws. (Trans. note: Railway Rules and Regulations.)

10. The Enterprise will not be responsible for the loss, theft, destruction or damage, total or partial, suffered by [fol. 37] the merchandise subject to transportation on the trains or stations, whether through the same shall proceed or emanate through a fortuitous case or superior force, or through acts of an armed force or of persons who may not be at the service of the Company, equally so it will not be

responsible for the loss, defalcation or damage of the merchandise in all or in part, through defect or vices belonging properly to the same, nor for breakage or shrinkage and likewise neither for the damages or deviations of the merchandise loaded by the shippers in cars placed at their disposition cared for by the same; it being understood that in this latter case and even when it has not been cared for in order to present any claim, he will have to prove that the damage or deviation (going astray) took place in transit and that it is chargeable or imputable to the Company.

11. In case of the going astray of baggage packages delivered or merchandise in order to be conducted on freight trains and providing that these packages are noted in this document, the Company, in case of responsibility, obligates itself to pay an indemnification up to $50.00 (Mexican ½ U. S. money) for trunks or large grips and up to $15 (Mexican) for any other bundles.

[fol. 38] 12. In case of loss, defalcation or damage in all or in part suffered by the merchandise delivered to the Company for its transportation, whether same be due to fire, theft or for any other cause that could be imputed to the same Company the responsibility of the latter shall be extinguished when a total loss is involved and crediting to the claimant the original cost of the goods and the return of the freight paid and in case of defalcation or damage, there shall be credited only the amount of the diminution or depreciation of the merchandise determined by its original cost and that portion of the freight rate that may correspond to it. For this purpose the person who makes these claims should present it within the period of 30 days counted from the time or date in which the loss took place, defalcation or damage; accompanying the bill of lading with the notation of loss or damage, placed thereon by the agent of the station (station agent) of the place of its destination and of the other justifications that accredit the responsibility of the Company. After the lapse of this time, no claim shall be accepted and in effect, the shipper or the person that takes such steps renounces in favor of the Company the term of time that fraction II of Article 592 and III of 1043 of the Commercial Code designates.

[fol. 39] 13. The freight rates and expenses upon all freight consigned to stations that have no agents, shall be

paid in advance and the effects or goods shall be delivered only to their owner or to the authorized Agent, upon the previous delivery of the bill of lading duly dated and with acknowledgment of receipt thereon. In case that the owner is not found at the Station ready to receive the freight, it shall be taken to the following station where there is an agent and it shall be delivered there upon the previous payment of a corresponding additional charge.

14. If the merchandise is not withdrawn from the warehouses of the Enterprise within the 48 hours following its arrival, it will occasion the payment of storage and if it should remain in them for a period of 90 days and if within that time no one claims the same in due form, the Company can place the same at judicial disposition for its sale to the end or for the purpose of reimbursing itself the freight and other expenses incidental to its conduction.

15. In case that this bill of lading pertains to merchandise consigned to some point not within the lines of this Company, the responsibility of this Company ceases at the moment that same are delivered to the participating car-
[fol. 40] rier who shall have to continue the transportation and for this purpose or effect the shipper hereby agrees to come to an understanding with the new participating carrier and renounces or waives the benefits conceded to him by Article 577 of the Commercial Code.

16. When the freight should be sold as expressed or provided by clauses 9 and 14 and the product of its sale does not reach the figure high enough to cover the amount of the freight and other charges that may be due the same, or on the other hand when the Company should have to demand or cause to make demands for the payment of freight rates and expenses or for the rectification of the same that they may have paid, it shall have the right to demand the outstanding accounts of payment, either from the participating carrier from whom he may have received the freight either from the first shipper or either from the consignee, at its election.

17. For the greater firmness and validity of the conditions that are expressed in this document, the shipper declares that he expressly waives the right conceded to him

by fractions IV, VI, VIII, and X of Article 590 of the Commercial Code.

18. When the freight is loaded by the consignor in a car [fol. 41] placed at his disposal, the Company shall collect double the rate of freight for the load that exceeds (10%) ten per cent of the capacity marked on the car.

STATE OF CALIFORNIA,
City and County of San Francisco, ss.:

Jose H. Alfonso, being first duly sworn, deposes and says: That he is a citizen of the United States and over the age of twenty one years; that he is by profession an interpreter and translator of the Spanish language into English and the English language into Spanish, with an office at Suite 316 No. 948 Market Street, Liberty Bank Building, in the aforesaid City and County and State;

That the translation of the Bill of Lading annexed hereto in Spanish is a true and correct translation of said Spanish Bill of Lading of the Southern Pacific Railroad of Mexico, a true and correct translation of same into the English language and fully expresses the true and correct value thereof.

Jose H. Alfonso.

Subscribed and sworn to before me this 24th day of November, A. D. 1926. Lester Ball, Notary Public in and for the City and County of San Francisco, State of California. (Seal.)

(Here follows Exhibit "E" to Answer, side folios 41-a and 41-b)

EXHIBIT "E" TO ANSWER

Forma 10060 (Revisada)

FERROCARRIL SUD-PACIFICO DE MEXICO.

RUTA DE LA COSTA OCCIDENTAL

CONOCIMIENTO DE EXPORTACION
EXPORT BILL OF LADING

Novbre 24-923

Navojoa.

SELLO DE LA ESTACION

Núm. del Remitente ..... Núm. del Agente .....

RECIBIDO el día 24 de Noviembre de 192 3, con sujeción a la clasificación y tarifas en vigor en la fecha de la expedición de este conocimiento.

En la Estación Navojoa Son de Agencia Comercial del Mayo

la carga que se describe en seguida, en aparente buen estado, con las observaciones anotadas, ignorándose el estado del contenido en los bultos; marcada, consignada y destinada según se indica a continuación y la que esta Empresa conviene en transportar al punto de destino siempre que éste estuviere situado en la línea, de otra manera la entregará a otro porteador para ser transportada a dicho punto de destino. Queda convenido mutuamente que todo servicio de transportación estará sujeto á las Leyes y Reglamentos ferroviarios y a todas las condiciones contenidas en el presente documento.

Consignada a Lewis Simas Jones Company (Gibraltar Warehouse)

Destino San Francisco Estado de California EUA

Vía S.P. Co to destination Inicial y Núm. del carro SP- 84996

Imp. Avendaño S. A. 1924

Núms. y Marcas por separado	Núm. de bultos	Naturaleza de los bultos	DESCRIPCION DE LA CARGA	Clase	Pesos sujetos a corrección
L.S.J.	840	Sacos	Cow Peas (Frijol Ojo Negro)		42420 K
Cow Peas			con 50.5 kilos bruto c/u		
50 Kilos Net.					
			S L & C		
			Flete a cobrar.		
			C/o Manuel F. Gonzalez.		
			Nogales Son.		

Clase	Kilogramos	Cuota por cada kilogramos	Cantidad
D-1			
1½ 1	Carro pedido de 80.000 lbs.		
1	Proporcionado de 100.000 lbs por		
2	el S.P. de M.		
3			
4			
5			
6			
7			
8			
9			
10			
11			
12			
MINIMA			

Importe total de Flete .....

Gastos adelantados por cuenta de .....

Carga y descarga .....

Timbres .....

TOTAL ¿Por cobrar o pagado? .....

FLETES Y GASTOS

El importe de los fletes y gastos se pagará anticipadamente, a juicio de la Compañía e invariablemente lo será cuando las mercancías sujetas a transportación sean de poco valor o susceptibles de descomposición en todo o parte; o igualmente cuando la carga vaya destinada a estaciones donde no haya Agente.

En las cuentas de fletes no se comprenderán gastos aduanales ni de comisión en las fronteras y puertos de salida, ni los que llegare a causar la mercancía en su tránsito o en su llegada al lugar de su destino.

Tanto el importe de los fletes, como los gastos que llegare a hacer la Compañía, deberán quedar cubiertos previamente a la entrega de la carga al consignatario y estarán sujetos a rectificación.

Estación de .....

Fecha .....

Recibí la carga que aquí se describe en buen estado aparente, o en las condiciones que se hacen notar. Por el consignatario o dueño de la carga.

Received the freight herein described in apparent good order or in the condition herein noted for the consignee or owner or freight.

..... CONSIGNATARIO / CONSIGNEE

Esta carga sometida a exportación estará sujeta a todas las condiciones que aparezcan en los conocimientos de los portadores que intervengan en su manejo y las condiciones de que habla el presente conocimiento, dejarán de tener efecto en cuanto difiera de aquellas condiciones y que se relacione con los actos de dichos portadores.

CONOCIMIENTO DE EXPORTACION
EXPORT BILL OF LADING

Núm. del Remitente ..... Núm. del Agente ..... SELLO DE LA ESTACION

RECIBIDO el día 24 de Noviembre de 192 3, con sujeción a la clasificación y tarifas en vigor en la fecha de la expedición de este conocimiento.

En la Estación Navojoa Son de Agencia Comercial del Mayo

la carga que se describe en seguida, en aparente buen estado, con las observaciones anotadas, ignorándose el estado del contenido en los bultos; marcada, consignada y destinada según se indica a continuación y la que esta Empresa conviene en transportar al punto de destino siempre que éste estuviere situado en la línea, de otra manera la entregará a otro porteador para ser transportada a dicho punto de destino. Queda convenido mutuamente que todo servicio de transportación estará sujeto a las Leyes y Reglamentos ferroviarios y a todas las condiciones contenidas en el presente documento.

Consignada a Lewis Simas Jones Company (Gibraltar Warehouse)

Destino San Francisco Estado de California EUA

Vía S.P. Co to destination Inicial y Núm. del carro SP- 84996

Imp. Avendaño S. A. 1925

Núms. y Marcas por separado	Núm. de bultos	Naturaleza de los bultos	DESCRIPCION DE LA CARGA	Clase	Pesos sujetos a corrección
L.S.J. Cow Peas 50 Kilos Net.	840	Sacos	Cow Peas (Frijol Ojo Negro) con 50.5 kilos bruto c/u		42420 K
			S L & C		
			Flete a cobrar.		
			C/o Manuel F. Gonzalez. Nogales Son.		

Clase	Kilogramos	Cuota por 1.000 kilogramos	Cantidad
D-1			
1	Carro pedido de 80.000 lbs.		
1	Proporcionado de 100.000 lbs por		
2	el S.P. de M.		
3			
4			
5			
6			
7			
8			
9			
10			
11			
12			
EXPRESS			

Importe total de Flete .....

Gastos adelantados por cuenta de .....

Carga y descarga .....

Timbres .....

TOTAL ¿Por cobrar o pagado? .....

FLETES Y GASTOS

El importe de los fletes y gastos se pagará anticipadamente, a juicio de la Compañía e invariablemente lo será cuando las mercancías sujetas a transportación sean de poco valor o susceptibles de descomposición en todo o parte; e igualmente cuando la carga vaya destinada a estaciones donde no haya Agente.

En las cuentas de fletes no se comprenderán gastos aduanales ni de comisión en las fronteras y puertos de salida, ni los que llegare a causar la mercancía en su tránsito o en su llegada al lugar de su destino.

Tanto el importe de los fletes, como los gastos que llegare a hacer la Compañía deberán quedar cubiertos previamente a la entrega de la carga al consignatario y estarán sujetos a rectificación.

Estación de .....

Fecha .....

Recibí la carga que aquí se describe en buen estado aparente, o en las condiciones que se hacen notar. Por el consignatario o dueño de la carga.

Received the freight herein described in apparent good order or in the condition herein noted for the consignee or owner or freight.

..... CONSIGNATARIO / CONSIGNEE

Esta carga sometida a exportación estará sujeta a todas las condiciones que aparezcan en los conocimientos de los porteadores que intervengan en su manejo y las condiciones de que habla el presente conocimiento, dejarán de tener efecto en cuanto difiera de aquellas condiciones y que se relacione con los actos de dichos porteadores.

This shipment, when exported, is subject to all conditions shown on bills of lading of participating carriers, and the conditions appearing on this bill of lading are without effect when differing from those shown on other carrier's bills of lading relative to acts on the part of said carriers.

Agencia Comercial del Mayo REMITENTE / CONSIGNOR ..... H. Navarro. JEFE DE ESTACION / AGENT

Por: J.A. Morales

Este documento no lleva los timbres correspondientes, por estar satisfecho su importe en virtud del contrato celebrado para ello con la Secretaría de Hacienda.

41-a

CONDICIONES:

1.—El remitente deberá dar a la Compañía con toda oportunidad los documentos necesarios que permitan el libre tránsito y entrega de las mercancías en el lugar de su destino; siendo por cuenta de aquél los comisos, multas y demás penas que impongan las autoridades por la falta de tales documentos, e indemnizará a la Compañía de los perjuicios que se le causen por el motivo indicado.

2.—Al expresarse el peso de la mercancía, la fracción menor de 10 kilogramos deberá considerarse como de 10 kilogramos completos y ningún flete podrá ser menor de 50 centavos, cualesquiera que sean la cantidad de la carga transportada y la distancia recorrida.

3.—Siempre que un bulto contenga mercancías clasificadas en las tarifas con cuotas de fletes diferentes, servirá de tipo para fijar a toda la carga, el que corresponda a la mercancía que tenga el tipo más elevado.

4.—La declaración hecha en este conocimiento acerca de la naturaleza y estado de los efectos que deban ser transportados, será la única que sirva de base en las cuestiones que se susciten entre el remitente que hace la declaración y la Empresa; reservándose ésta, sin embargo, el derecho de rectificar la declaración del remitente, exigiendo de éste la apertura y reconocimiento de los bultos que contengan las mercancías en el acto de su recepción. La Compañía queda relevada de responsabilidad por las averías que ocurran o por cualquiera otra causa, en caso de falsedad cometida en la declaración; sin perjuicio de que el remitente, o en su defecto, el consignatario, sean obligados a pagar la diferencia de portes y los daños y perjuicios; reservándose la propia Compañía las demás acciones a que tenga derecho.

5.—Los fletes y gastos por carga sujeta a transportación, podrá rectificarlos en todo tiempo la Compañía y el remitente o el consignatario sólo podrán hacerlo en el acto del recibo de la carga en su destino.

6.—El remitente podrá variar el punto de destino de la mercancía interin ésta no haya llegado a su destino, así como la persona del consignatario mientras que aquélla no se haya puesto a disposición de éste; pero en ambos casos será condición precisa la de que al pedir estos cambios se devuelva el conocimiento, haciendo constar en el mismo, el remitente, con su firma, que queda anulado este documento y no de otra manera. En este caso, el remitente tendrá la obligación de pagar los gastos que por esta operación se ocasionen a la Compañía.

7.—Una vez puesta la mercancía por esta Empresa a disposición del consignatario, el remitente no tendrá ya derecho alguno sobre la propia mercancía, la cual pertenece al consignatario.

8.—Los bultos que contengan las mercancías deberán llevar el nombre y dirección del consignatario y serán sellados cuando así lo exija la Compañía. Si intervinieren Agentes Aduanales extraños al servicio de la Compañía, señalados por el remitente para el manejo de la carga en las Aduanas o Agencias Fiscales, los bultos que contengan las mercancías deberán sellarse por dichos Agentes y la falta de esto eximirá a la Compañía de toda responsabilidad en la pérdida o menoscabo de la mercancía. Efectuada la descarga en el lugar de su destino, las mercancías quedarán a riesgo de su dueño.

9.—El consignatario inquirirá el arribo de la carga en el lugar de su destino; teniendo la obligación de retirarla dentro de 48 horas y dentro de 24 si los efectos son susceptibles de perderse o averiarse. En este último caso, pasado dicho plazo de 24 horas sin haberse retirado, serán vendidos desde luego, de conformidad con lo dispuesto por el Artículo 164 del Reglamento General de Ferrocarriles.

10.—La Empresa no será responsable de la pérdida, robo, destrucción o avería, total o parcial que sufran las mercancías sujetas a transportación en los trenes o estaciones, ya procedan de caso fortuito o fuerza mayor, o ya de actos de fuerza armada o de personas que no estén al servicio de la Compañía. Igualmente no será responsable por la pérdida, desfalco o avería de las mercancías en todo o en parte, por defecto o vicio propios de las mismas, no por roturas o mermas; así como tampoco de las averías o extravíos de las mercancías cargadas por los remitentes en carros puestos a su disposición cuidados por los mismos; entendiéndose que en este último caso y aún cuando no haya sido cuidada, para presentar cualquiera reclamación, tendrá que probar que la avería o extravío tuvo lugar en el tránsito y que es imputable a la Compañía.

11.—En caso de extravío de bultos de equipaje entregados como mercancías, para que se conduzcan en trenes de carga y siempre que estén anotados en este documento, la Compañía, en caso de responsabilidad, se obliga a pagar como indemnización hasta $50.00 por baúles o petacas grandes y hasta $15.00 por cualquier otro bulto.

12.—En caso de pérdida, desfalco o avería, en todo o en parte, que sufran las mercancías entregadas a la Compañía para su transportación, ya procedan de incendio, robo o por cualquier otra causa que pudiera imputarse a la misma Compañía, la responsabilidad de ésta quedará extinguida cuando se trate de pérdida total, abonando al reclamante el costo original de la mercancía y la devolución del flete pagado y en caso de desfalco o avería, se abonará solamente el importe del menosprecio o demérito de la mercancía, en atención a su costo original y la porción del flete que corresponda. A este fin, la persona que haga su reclamación deberá presentarla dentro del término de 30 días contados de la fecha en que haya tenido lugar la pérdida, desfalco o avería; acompañando el conocimiento con la anotación de pérdida o daño, puesta por el Agente de Estación del lugar de su destino y de los demás justificantes que acrediten la responsabilidad de la Compañía. Pasado ese término no se aceptará ninguna reclamación y al efecto, el remitente o la persona que haga sus veces, renuncia a favor de la Compañía el término que señala la fracción II del artículo 592 y III de 1043 del Código de Comercio.

13.—Los fletes y gastos sobre toda carga consignada a Estaciones que no tengan Agente, se pagarán adelantados y los efectos se entregarán solamente a su dueño o a su Agente autorizado, previa entrega del conocimiento debidamente fechado y con el acuse de recibo. En caso de que no se encuentre el dueño en la estación listo para recibir la carga, será llevada a la estación siguiente en donde haya Agente y se entregará allí previo pago del correspondiente cargo adicional.

14.—Si la mercancía no se retirase de los almacenes de la Empresa, dentro de las 48 horas siguientes a su arribo, causará el pago de almacenaje y si durase en ellos el término de 90 días y dentro de dicho término nadie la reclama en debida forma, podrá la Compañía ponerla a disposición judicial para su venta, a fin de reembolsarse del flete y demás gastos para su conducción.

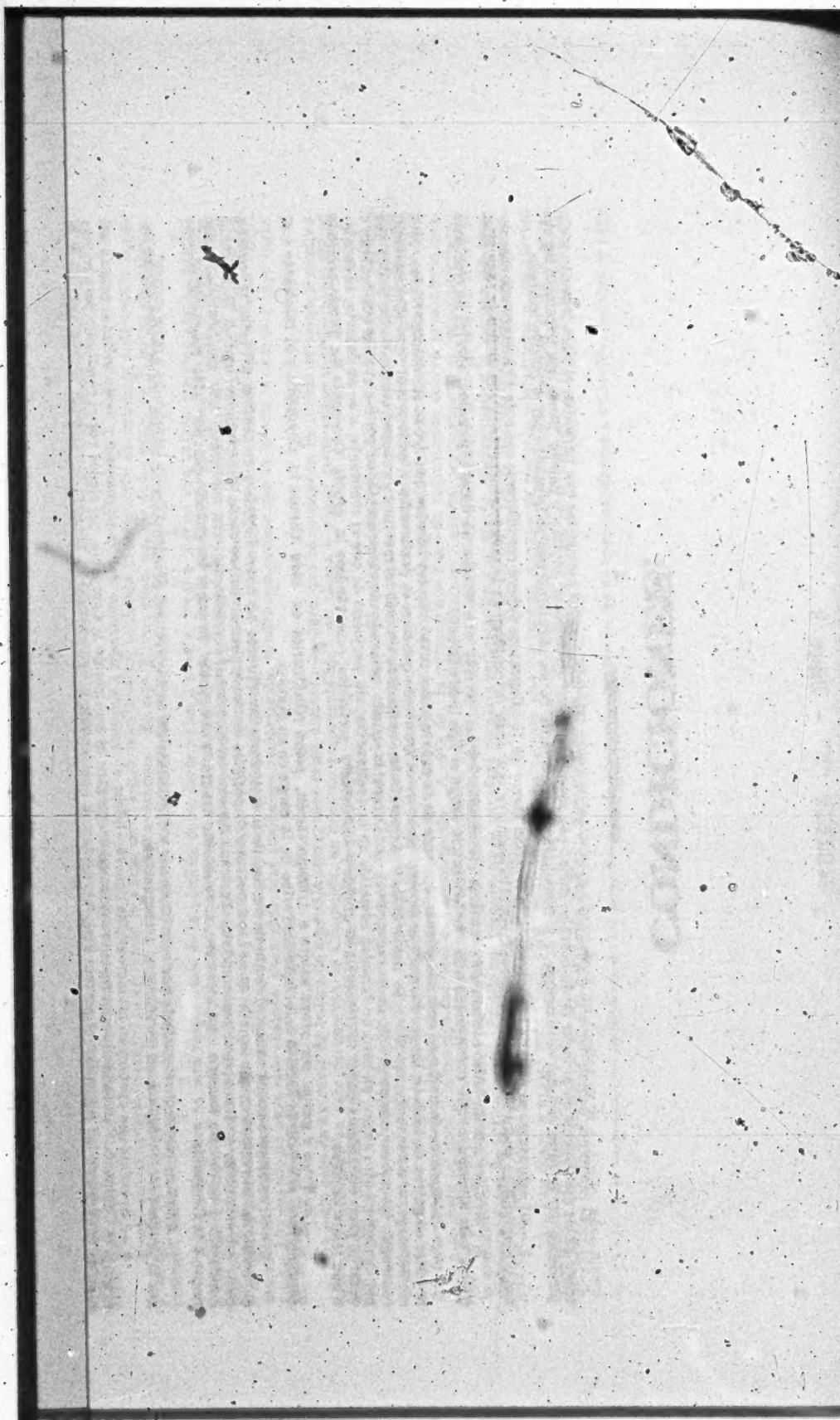
15.—En caso de que este conocimiento ampare mercancías consignadas a algún punto que no comprendan las líneas de esta Compañía, la responsabilidad de ésta cesa en el momento que las entrega al portador que haya de continuar el transporte y a este efecto el remitente está conforme en entenderse con el nuevo portador y renuncia los beneficios que le concede el artículo 577 del Código de Comercio.

16.—Cuando la carga deba de venderse, como lo expresan los puntos 9 y 14 y el producto de su venta no alcance a cubrir el importe de fletes y gastos que adeudare, o bien cuando la Compañía tuviere que hacer reclamaciones por el pago de fletes y gastos o por rectificación de los mismos que hubieren pagado, tendrá derecho a exijir las cantidades pendientes de pago, bien del porteador de quien haya recibido la carga, bien del primer remitente, o bien del consignatario, a su elección.

17.—Para la mayor firmeza y validez de las condiciones que en este documento se expresan, el remitente declara que expresamente renuncia el derecho que le conceden las fracciones IV, VI, VIII y X del artículo 590 del Código de Comercio.

18.—Cuando la carga se sitúe por el consignador en carro puesto a su disposición, la Compañía cobrará doble tipo de flete por la carga que exceda de diez por ciento (10%) de la capacidad marcada en el carro.

26-b



[fol. 42] EXHIBIT F TO ANSWER

Southern Pacific Railroad of Mexico, West Coast Route

Export Bill of Lading

Number of the Shipper: ——. No. of the Agent ——.

Stamp of the Station, Navojoa, Nov. 24, -923.

Received the 24th day of November, 1923, subject to the classification and tariffs in force on the date of the issuing of this bill of lading. At the Station Navojoa Son from Commercial Agency of Mayo The freight which is described immediately following in apparent good order with the notations thereon, ignoring the condition of the contents in the packages; marked consigned and destined according to how it is indicated hereinafter and which this enterprise agrees to transport to the point of destination, providing this said point is situated on the line, otherwise it will be delivered to another participating carrier to be transported to said point of destination. It is hereby mutually agreed that all transportation service shall be subject to the laws and railway regulations and to all of the conditions contained in the present document.

Consigned to Lewis Simas Jones Company. (Gibraltar Warehouse)

Destination San Francisco State of California USA

Initial and number of the car SP 84996.

Via S. P. Co. to destination.

[fol. 43]

No. & marks separately	No. of packages	Nature of packages	Description of the freight (shipment)	Class	Weights, subject to correction
L. S. J.	840	Sacks	Cow Peas (Frijol ojo Negro) with 50.5 Kilos Gross weight each one.	....	42420 kilograms

S L & C Freight to Collect c/o Manuel F. Gonzalez, Nogales Son

Class	Rate, kilograms per 1000 kilograms	Amount or sum	Freight and expenses
D-1	Car requested of 80,000 lbs..	.....	The amount or value of the freight and expenses shall be paid in advance within the discretion of the Company and this shall be invariably when the merchandise
1½-1	Car furnished		
1	of 100,000 lbs. by the S. P.		

S L & C. Freight for Collection. c/o Manuel F. Gonzalez, Nogales, Son.

Class	Rate, kilograms per 1000 kilograms	Amount or sum	Freight and expenses
	of M.....	.....	or goods subject to transportation
2	.....	.....	are of little value or susceptible
3	.....	.....	to decomposition in all or in part
4	.....	.....	and equally so when the freight
5	.....	.....	is destined to stations where there
6	.....	.....	is no agent.
7	.....	.....	In the freight accounts will not
8	.....	.....	be included custom house nor
9	.....	.....	commission charges at the fron-
10	.....	.....	tier and ports of departure, nor
11	.....	.....	what the merchandise would hap-
12	.....	.....	pen to occasion in its transit or
(Special)	.....	.....	on its arrival at the place of desti-
			nation.
			The amount of values of the
			freights, as well as the expenses
			that the company may happen to
			incur should be covered previous
			[fol. 44] to the delivery of the freight
			to the consignee and shall be sub-
			ject to rectification.

Station of: ——. Date: —— —, ——. ——————

Total amount of freight: ——.

Expenses advanced for account of ——.

Loading and Unloading: ——.

Revenue Stamps: ——.

Total to collect or paid? ——.

Received the freight herein described in apparent good order or in the condition herein noted for the consignee or owner of the freight.

—— ——, (Consignee).

This freight (or shipment) when submitted to exportation shall be subject to all of the conditions shown on bills of lading of participating carriers and the conditions appearing on this bill of lading are without effect, when differing from those shown on other carriers' bills of lading relative to acts on the part of said carriers.

Commercial Agency of Mayo (Consignor), by J. A. Morales. H. Navarro (Station Agent).

This document does not carry thereon the corresponding revenue stamps, as the amount thereof has been fully satisfied by virtue of the contract entered into concerning same with the Secretary of the Treasurer or Finance.

Conditions

1. The shipper shall deliver to the Company with due diligence the necessary documents that will permit the free transit and delivery of the merchandise at the place of its destination; the seizure or confiscation, fines and other penalties that may be imposed by the authorities for the lack of such documents being charged to his account and he shall indemnify the Company for the damages that may [fol. 45] be caused to the same for the reason indicated.

2. In expressing the weight of the merchandise, the fraction less than 10 kilograms shall be considered as that of ten kilograms complete and no freight can be less than 50 centavos (Translator's note: 50 centavos is equivalent to 25 cents American money) whatever may be the quantity of the merchandise transported and the distance covered.

3. Whenever a package contains classified goods in the tariffs with different freight rates, it shall serve as a type to fix to all of the load that which corresponds to the merchandise that has or bears the highest rate.

4. The statement made in this bill of lading concerning the nature and condition of the effects which should be transported will be the only one which shall serve as a basis in the questions which may arise between the shipper who makes the statement or declaration and the Enterprise; the latter reserving, however, the right of correcting the declaration of the shipper exacting from him the opening and examination of the packages that contain the merchandise in the act of its reception or receipt. The Company remains relieved of responsibility for the damages that may occur or for any other cause, in case of falsehood committed [fol. 46] in the declaration; without prejudice that the shipper or in his absence, the consignee shall be obliged to pay the difference in freight rates and the damages and prejudice the Company itself reserving its right to all the other actions or suits.

5. The freight rates and the expenses for freight subject to transportation can be rectified at any time by the company and the shipper or the consignee can only do so upon the act of the receipt of the freight at destination.

6. The shipper can change the point of destination of the merchandise while the same has not arrived at its destination as likewise the person of the consignee while it has not been placed at the disposition of the latter; but in either case it will be a precise condition that upon the request of these changes, the bill of lading be returned, the shipper causing to be inscribed therein with his signature that this document remains nullified and not in any other manner. In this case the shipper shall be obliged to pay the expenses that because of this operation are incurred by the Company.

7. Once the merchandise has been placed by this Enterprise at the disposition of the consignee, the shipper will [fol. 47] then have no right whatever upon the merchandise itself, which belongs to the consignee.

8. The packages that contain the merchandise shall bear thereon the name and address of the consignee and they shall be sealed when thus exacted by the Company. If custom house agents foreign to the service of the Company should intervene, designated by the shipper for the handling of the freight at the custom houses or fiscal agencies, the bundles that contain the merchandise shall be sealed by said agents and the lack of this shall exempt the Company from all responsibility in the loss or deterioration of the merchandise. The unloading of same having been effected at the place of its destination, the goods shall remain at the risk of the owner.

9. The consignee shall inquire as to the arrival of the freight at the place of its destination, having the obligation of removing same within 48 hours and within 24 hours if the effects are susceptible of perishing or damage. In this latter case the period of 24 hours having elapsed without being removed, they shall be sold at once, in conformity with the proviso of Article 164 of the General Railway By-Laws. (Trans. note: Railway Rules and Regulations.)

10. The Enterprise will not be responsible for the loss, theft, destruction or damage, total or partial, suffered by [fol. 48] the merchandise subject to transportation on the trains or stations, whether through the same shall proceed or emanate through a fortuitous case or superior force, or through acts of an armed force or of persons who may not be at the service of the Company, equally so it will not be

responsible for the loss, defalcation or damage of the merchandise in all or in part, through defect or vices belonging properly to the same, nor for breakage or shrinkage and likewise neither for the damages or deviations of the merchandise loaded by the shippers in cars placed at their disposition cared for by the same; it being understood that in this latter case and even when it has not been cared for in order to present any claim, he will have to prove that the damage or deviation (going astray) took place in transit and that it is chargeable or imputable to the Company.

11. In case of the going astray of baggage packages delivered as merchandise in order to be conducted on freight trains and providing that these packages are noted in this document, the Company, in case of responsibility, obligates itself to pay as indemnification up to $50.00 (Mexican ½ U S money) for trunks or large grips and up to $15 (Mexican) for any other bundles.

[fol. 49] 12. In case of loss, defalcation or damage in all or in part suffered by the merchandise delivered to the Company for its transportation, whether same be due to fire, theft or for any other cause that could be imputed to the same Company the responsibility of the latter shall be extinguished when a total loss is involved and crediting to the claimant the original cost of the goods and the return of the freight paid and in case of defalcation or damage, there shall be credited only the amount of the diminution or depreciation of the merchandise determined by its original cost and that portion of the freight rate that may correspond to it. For this purpose the person who makes these claims should present it within the period of 30 days counted from the time or date in which the loss took place, defalcation or damage; accompanying the bill of lading with the notation of loss or damage, placed thereon by the agent of the station (station agent) of the place of its destination and of the other justifications that accredit the responsibility of the Company. After the lapse of this time, no claim shall be accepted and in effect, the shipper or the person that takes such steps renounces in favor of the Company the term of time that fraction II of Article 592 and III of 1043 of the Commercial Code designates.

[fol. 50] 13. The freight rates and expenses upon all freight consigned to stations that have no agents, shall be paid in advance and the effects or goods shall be delivered only to their owner or to the authorized Agent, upon the previous delivery of the bill of lading duly dated and with acknowledgment of receipt thereon. In case that the owner is not found at the Station ready to receive the freight, it shall be taken to the following station where there is an agent and if shall be delivered there upon the previous payment of a corresponding additional charge.

14. If the merchandise is not withdrawn from the warehouses of the Enterprise within the 48 hours following its arrival, it will occasion the payment of storage and if it should remain in them for a period of 90 days and if within that time no one claims the same in due form, the Company can place the same at judicial disposition for its sale to the end or for the purpose of reimbursing itself the freight and other expenses incidental to its conduction.

15. In case that this bill of lading pertains to merchandise consigned to some point not within the lines of this Company, the responsibility of this Company ceases at the moment that same are delivered to the participating carrier who shall have to continue the transportation and [fol. 51] for this purpose or effect the shipper hereby agrees to come to an understanding with the new participating carrier and renounces or waives the benefits conceded to him by Article 577 of the Commercial Code.

16. When the freight should be sold as expressed or provided by clauses 9 and 14 and the product of its sale does not reach the figure high enough to cover the amount of the freight and other charges that may be due the same, or on the other hand when the Company should have to demand or cause to make demands for the payment of freight rates and expenses or for the rectification of the same that they may have paid, it shall have the right to demand the outstanding accounts of payment, either from the participating carrier from whom he may have received the freight either from the first shipper or either from the consignee, at its election.

17. For the greater firmness and validity of the conditions that are expressed in this document, the shipper de-

clares that he expressly waives the right conceded to him by fractions IV, VI, VIII, and X of Article 590 of the Commercial Code.

18. When the freight is loaded by the consignor in a car placed at his disposal, the company shall collect double [fol. 52] the rate of freight for the load that exceeds (10%) ten per cent of the capacity marked on the car.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Jose H. Alfonso, being first duly sworn, deposes and says: That he is a citizen of the United States and over the age of twenty-one years; that he is by profession an interpreter and translator of the Spanish language into English and the English language into Spanish, with an office at Suite 316 No. 948 Market Street, Liberty Bank Building, in the aforesaid city and county and State;

That the translation of the bill of lading annexed hereto in Spanish, is a true and correct translation of said Spanish bill of lading of the Southern Pacific Railroad of Mexico, a true and correct translation of same into the English language and fully expresses the true and correct value thereof.

Jose H. Alfonso.

Subscribed and sworn to before me this 24th day of November, A. D. 1926. Lester Ball, Notary Public in and for the City and County of San Francisco, State of California. (Seal.)

[fol. 53] (Endorsed:) Service of the within answer is admitted this 3rd day of January, 1927. E. W. Hollingsworth, Attorney for Plaintiff.

[File endorsement omitted.]

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

DEMURRER TO ANSWER—Filed Jan. 10, 1927

Now comes the above named plaintiff and demurs to the answer of the defendant on file herein and to each and every

alleged defense in said answer upon the following grounds, to wit:

I

That the said answer does not state facts sufficient to constitute a defense to the complaint herein.

II

That the first alleged defense commencing at line 12 on page 1 and ending at line 1 on page 5 of the said answer does not state facts sufficient to constitute a defense.

III

That the second alleged defense commencing at line 5 [fol. 54] and ending at line 13 on page 5 of the said answer does not state facts sufficient to constitute a defense.

E. W. Hollingsworth, Attorney for Plaintiff.

(Endorsed:) Receipt of copy of the within demurrer admitted this 7th day of January, 1927. A. L. Whittle, F. W. Mielke, James E. Lyons, Attorneys for Defendant.

[File endorsement omitted.]

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

ORDER ON DEMURRER TO COMPLAINT, ETC.

Thursday, September 1, 1927.

Present: Honorable Timothy I. Fitpatrick, judge, and officers of the court.

In this action:

1. Demurrer to the complaint;

2. Demurrer to answer;

3. Motion to strike parts of answer; and

4. Cause having been heretofore submitted to the court, and the court having duly considered the same and now [fol. 55] being fully advised in the premises; *and* it is ordered that

1. Demurrer to complaint be overruled;

2. Demurrer to answer, sustained;

3. Motion to strike parts of answer granted; and

4. Cause, ordered judgment in favor of plaintiff as prayed.

[Entered in minutes of department No. 8, volume 236, page 174.]

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

ORDER ON MOTIONS

Saturday, February 11, 1928.

Present: Honorable Louis H. Ward, judge, and other officers of the court.

In this action, it is by the court ordered that the heretofore submitted motion for counsel fees at $400 on account, be and is hereby granted.

Motion for leave to file amended answer be granted.

Motion to vacate minute order of September 1, 1927, granted.

[Entered in minutes of department No. 16, volume 245, page 158.]

[fol. 56] IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

AMENDMENT TO ANSWER—Filed Feb. 15, 1928

Comes now the above named defendant and, having first obtained leave of court, hereby amends its answer on file in the above entitled action by striking out all of paragraph V, page 4 thereof, and substituting therefor the following:

V

Defendant avers that, at all times mentioned in said complaint, the line of railroad, over which the shipments involved herein moved from Navojoa to San Francisco, crossed the

international boundary between the Republic of Mexico and the United States at Nogales, Arizona, which said point is located on said line and route; and that, at all times mentioned in said complaint, defendant Southern Pacific Company maintained a rate applicable on cow peas, carloads, from the said international boundary line at Nogales, Arizona, to San Francisco, California, which rate would have been applicable for the transportation within the United States of the shipments mentioned in the complaint had the consignors or owners elected to consign the same to said international boundary line and had thence reshipped said cow peas from said international boundary line to San Francisco; and that the Interstate Commerce Commission [fol. 57] has not at any time found said local rate from the international boundary at Nogales, Arizona, to San Francisco, California, to be or to have been unjust or unreasonable, or otherwise in violation of law.

Defendant avers that the order of the Interstate Commerce Commission, mentioned in paragraph V of said complaint, is arbitrary, unjust, unreasonable and contrary to law, in that it purports to require, and if enforced by judgment of this court, will require the defendant to refund to the plaintiff the difference between the lawful joint through rate charged, to wit, $1.33 per 100 pounds, and the amount of 94 cents per 100 pounds subsequently found by the Interstate Commerce Commission in its report herein to have been reasonable as a joint through rate on cow peas from Navojoa, Sonora, Mexico, to San Francisco; that said finding was made without any allegation, proof or finding that the said rate on cow peas, carloads, from the international boundary line between the Republic of Mexico and the United States, on defendant's line of railroad, to San Francisco is unjust or unreasonable or otherwise unlawful.

Defendant further avers that by reason thereof, the order of the Interstate Commerce Commission is nugatory and void for want of jurisdiction of the subject matter by said [fol. 58] Commission; and that if enforced by judgment of this court, will take the property of this defendant without due process of law, in violation of Section 13 of Article I of the Constitution of the State of California, and the 5th and 14th Amendments to the Constitution of the United States.

Wherefore defendants pray that plaintiff take nothing by its complaint herein, but that the same be dismissed with costs to defendant.

F. W. Mielke, Albert L. Whittle, James E. Lyons, Attorneys for Defendant.

Duly sworn to by J. L. Fielding. Jurat omitted in printing.

[fol. 59] (Endorsed:) Service of the within amendment to answer is admitted this — day of February, 1928. E. W. Hollingsworth, Attorney for Plaintiff.

[File endorsement omitted.]

In Superior Court of City and County of San Francisco

Demurrer to Answer as Amended—Filed Feb. 15, 1928

Now comes the above named plaintiff and demurs to the answer of the defendant on file herein, as amended, and to each and every alleged defense in said answer in said amendment upon the following grounds, to wit:

I

That the said answer does not state facts sufficient to constitute a defense to the complaint herein.

[fol. 60]

II

That the first alleged defense, commencing at line 12, on page 1 and ending at line 1 on page 5 of the said answer, as amended, does not state facts sufficient to constitute a defense.

III

The second alleged defense, commencing at line 5 and ending at line 13 on page 5 of the said answer does not state facts sufficient to constitute a defense.

E. W. Hollingsworth, Attorney for Plaintiff.

I hereby certify that I am the attorney for the plaintiff in the above entitled action and that I have read the fore-

going demurrer and know the contents thereof; that in my opinion the same is well taken in point of law and is not interposed for the purpose of delay.

E. W. Hollingsworth.

(Endorsed:) Receipt of copy of the within demurrer admitted this 15th day of February, 1928. F. W. Mielke, Albert E. Lyons, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 61] IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

ORDER OVERRULING DEMURRER TO ANSWER AS AMENDED AND DENYING MOTION TO STRIKE OUT

Monday, March 12, 1928.

Present: Honorable Louis H. Ward, judge, and other officers of the court.

In this action it is ordered by the court that the motion to set aside order be denied and the demurrer be overruled and notice was waived.

[Entered in minutes of department No. 16, volume 245, page 272.]

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed Aug. 30, 1929

This cause came on regularly for trial on the 26th day of October, 1928, before the above entitled court, Honorable John J. Van Nostrand, judge, presiding, and was tried by the court without a jury, a jury trial having been duly waived by the parties, and oral and documentary evidence having been received, and the cause thereafter duly submitted upon briefs filed by the parties, the court, from the evidence introduced, now finds the facts as follows, to-wit:

[fol. 62] Findings of Fact

1. That plaintiff is, and at all times herein mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the State of California.

2. That defendant is, and at all times herein mentioned has been, a corporation duly organized and existing under and by virtue of laws of the State of Kentucky, and was and is engaged as a common carrier in the transportation of property for hire in interstate commerce, having a line of railroad extending from Nogales, Arizona, to San Francisco, California.

3. That Southern Pacific Railroad Company of Mexico is, and at all times herein mentioned has been, a corporation organized and existing under laws of the State of New Jersey, engaged as a common carrier in the operation of lines of railroad in the Republic of Mexico, having a line of railroad extending from Navojoa, State of Sonora, Republic of Mexico, to the international boundary line between the United States and the Republic of Mexico, at or adjacent to Nogales, Arizona; that at all said times said line of railroad connected, at a point upon said international boundary line at Nogales, Arizona, with the railroad line of defendant Southern Pacific Company.

[fol. 63] 4. (a) That during the month of November, 1923, said Southern Pacific Company of Mexico received at Navajoa, Sonora, Mexico, from A. Von Borstel, Agustin Von Borstel, and Agencia Comercial del Mayo, three (3) carload shipments of "cow peas" which were respectively consigned to plaintiff at San Francisco, California, U. S. A.; and that said Southern Pacific Railroad Company of Mexico thereupon issued its export bills of lading (Conocimiento de Exportacion) therefor, a copy of each of which, together with a true and correct translation thereof from the Spanish into the English language, is annexed to the answer to the complaint on file herein, and marked exhibits "A," "B," "C," "D," "E," and "F," respectively; that each of said export bills of lading acknowledged receipt of said cow peas "subject to the classification and (Mexican) tariffs in force on the date of the issuing" of said bills

of lading, and it was therein mutually agreed between the said respective shippers and the said Southern Pacific Railroad Company of Mexico that "all transportation service shall be subject to the laws and railway regulations and to all the conditions contained in the present document";

(b) That said cow peas were thereupon duly transported [fol. 64] by the Southern Pacific Railroad Company of Mexico from Navajoa, Sonora, Mexico, to the junction of its line of railroad with that of the defendant Southern Pacific Company at the international boundary line at Nogales, Arizona, at which last named point said carload shipments were delivered to and received by defendant Southern Pacific Company under said export bills of lading for further transportation over the latter's line of railroad from Nogales, Arizona, to San Francisco, California; and that said carload shipments were thereafter duly transported by defendant and delivered to and received by plaintiff at San Francisco, California.

5. That the defendant collected from the plaintiff, and the plaintiff paid to the defendant, freight charges for the transportation of said shipments, amounting in the aggregate to the sum of $3828.74.

6. That said freight charges were based upon the aggregate weights of the said shipments, and a joint through rate of $1.33 per 100 pounds maintained by said Southern Pacific Railroad Company of Mexico and defendant, said joint through rate having theretofore been published and filed with the Department of Communications and Public Works of the Republic of Mexico and with the Interstate Commerce Commission.

[fol. 65] 7. That subsequent to the transportation and delivery of said shipments, and on or about July 31, 1924, plaintiff filed a complaint with the Interstate Commerce Commission against defendant, alleging that the aforesaid rate charged for the transportation of said shipments from Navojoa, Sonora, Mexico, to San Francisco, California, was unreasonable and in violation of the Interstate Commerce Act, and praying said Commission to award damages for said asserted violation of the Interstate Commerce Act; that said complaint was thereafter duly considered by

the Interstate Commerce Commission, upon evidence submitted by the parties; that thereafter, and on September 18, 1925, said Commission rendered its report and made its order authorizing and directing said defendant to pay unto complainant the sum of $1122.72, with interest thereon at 6 per cent per annum from and after January 1st, 1924, as reparation on account of the assessment and collection of charges upon the basis of the aforesaid joint through rate of $1.33 per 100 pounds; that said report of the Interstate Commerce Commission is embodied in its official printed reports, under the name and style of "Lewis-Simas-Jones Company vs. Southern Pacific Company," and is reported in Volume 102 I. C. C. Reports, at page 245; that defendant [fol. 66] refused to comply with said order of the Interstate Commerce Commission; and thereafter, and on or about the 6th day of August, 1926, plaintiff filed a complaint with the above-entitled court in this cause, praying for the enforcement of the said order of the Commission, and for attorneys' fees and costs.

8. That at all times herein mentioned prior to the eleventh day of December, 1923, and upon all the dates upon which the said shipments of the plaintiff were in course of transportation from Navojoa, Sonora, Mexico, to San Francisco, California, the defendant duly maintained and published in a tariff on file with the Interstate Commerce Commission, a rate of $1.14½ per 100 pounds, applicable on carload shipments of cow peas originating at Nogales, Arizona, and destined to San Francisco, California; that said rate was duly published in Southern Pacific Company Tariff No. 612-E, I. C. C. No. 4381, at page 57; that its application to cow peas was authorized and provided in and by Pacific Freight Tariff Bureau Tariff Exception Sheet No. 1-I, I. C. C. No. 640, published by F. W. Gomph, as Agent for Southern Pacific Company, and other railroad carriers, and duly concurred in by defendant Southern Pacific Company; that said rate of $1.14½ per 100 pounds [fol. 67] was applicable to carload shipments of cow peas originating at the point where the lines of railroad of the Southern Pacific Railroad Company of Mexico and defendant touch the international boundary line between the United States and Mexico, at Nogales, Arizona, and destined

to San Francisco, California, and was likewise applicable upon carload shipments of cow peas loaded into cars at any point upon or adjacent to said international boundary line, within the limits of defendant's railroad yards at Nogales, Arizona, and destined to San Francisco, California.

9. That plaintiff's shipments were contained in sacks; that said shipments could readily have been transported by other means than by railroad to a point at said international boundary line within the limits of defendant's railroad yards at Nogales, Arizona, and there loaded into railroad freight cars for movement over defendant's line; that the rate applicable upon shipments from such point upon the international boundary line at Nogales, Arizona, to San Francisco, at the time plaintiff's aforesaid shipments moved, was said last mentioned rate of $1.14½ per 100 pounds.

10. That the railroad freight yards of the defendant at Nogales, Arizona, include within their limits main line [fol. 68] tracks and sidings which actually touch the physical boundary line between the United States and Mexico; that freight cars may be placed for the loading of freight upon said tracks, at said international boundary line, and there loaded with freight for transportation by rail to destinations within the United States, and particularly to San Francisco, California.

11. That said rate of $1.14½ per 100 pounds last mentioned was at all times reasonable and lawful for application upon carload shipments of cow peas from Nogales, Arizona, including such shipments as might be loaded at any and all places within the railroad yard limits at that point, destined to San Francisco, California; that said rate was not alleged to have been, or to be, unreasonable, in the complaint of the plaintiff filed with the Interstate Commerce Commission, as hereinbefore set forth; that plaintiff introduced no evidence, in said case before the Interstate Commerce Commission, showing or tending to show that said last-mentioned rate was other than a reasonable and lawful rate for application upon shipments of cow peas from Nogales, Arizona, to San Francisco, California, and that said Interstate Commerce Commission made no finding with respect thereto.

[fol. 69] Conclusions of Law

As conclusions of law from the foregoing facts, the court finds and concludes that the Interstate Commerce Commission was without jurisdiction, under the Interstate Commerce Act, to make its order hereinbefore referred to purporting to award reparation to the aforesaid plaintiff, in the sum of $1,122.72, with interest, or in any other sum or sums whatsoever; that said order of the Interstate Commerce Commission was and is null and void, and of no effect; and that defendant is entitled to judgment dismissing the complaint and for its costs of action herein incurred, and that plaintiff take nothing by its action.

Let judgment be entered accordingly.

John J. Van Nostrand, Judge of said Superior Court.

[File endorsement omitted.]

In Superior Court of City and County of San Francisco

Judgment—Filed Aug. 30, 1929

The above entitled cause coming on regularly for trial on the 26th day of October, 1928, E. W. Hollingsworth, Esq., [fol. 70] appearing for plaintiff, and Henley C. Booth and A. Burton Mason, Esqs., appearing for defendant, and the plaintiff having submitted said cause upon the allegations of the complaint and answer as amended, and evidence having been introduced by the defendant, and said cause having been duly submitted for decision upon briefs filed by the respective parties, and the court, being fully advised, having rendered its findings of fact and conclusions of law herein, wherein judgment is ordered in favor of the defendant and against the plaintiff:

Now, therefore, by reason of the law and the findings aforesaid:

It is ordered, adjudged and decreed that the plaintiff take nothing by this action, and that defendant have judgment for its costs of suit therein, taxed at $8.00.

Dated, San Francisco, California, this 30th day of August, 1929.

John J. Van Nostrand, Judge of the Superior Court.

[File endorsement omitted.]

Recorded Aug. 30, 1929, 10:40 o'clock A. M., volume 303, page 210.

H. I. Mulcrevy, Clerk, by Nathan Goldberg, Deputy Clerk.

[fol. 71] Clerk's certificate to Judgment Roll omitted in printing.

[fol. 72] IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

NOTICE OF INTENTION TO MOVE FOR NEW TRIAL—Filed Sept. 3, 1929

To James E. Lyons, Albert L. Whittle, Henley C. Booth, and A. Burton Mason, attorneys for defendant:

Take notice, that plaintiff, Lewis-Simas-Jones Company, intends to move the court to vacate and set aside the judgment rendered in the above cause, and to grant a new trial of said cause, upon the following grounds, to wit:

I

That the evidence is insufficient to justify the judgment.

II

That the findings of fact are not supported by the evidence.

III

That the findings of fact do not support the judgment.

IV

That the judgment is contrary to law.

V

Errors in law occurring at the trial, and excepted to by the plaintiff.

Said motion will be made upon the minutes of the court in said cause.

[fol. 73] Dated San Francisco, California, September 3, 1929.

E. W. Hollingsworth, Attorney for Plaintiff.

(Endorsed:) Receipt of copy of the within notice of intention to move for new trial admitted this 3rd day of September, 1929. A. L. Whittle, J. E. Lyons, Attorneys for Defendant.

[File endorsement omitted.]

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

NOTICE OF APPEAL FROM JUDGMENT—Filed Nov. 1, 1929

To James E. Lyons, Albert L. Whittle, Henley C. Booth, and A. Burton Mason, attorneys for defendant, and to the clerk of the above entitled court:

You and each of you will please take notice that the plaintiff in the above entitled action hereby appeals to the District Court of Appeal of the State of California, first appellate district, from the judgment made and entered in [fol. 74] said Superior Court in said action on the 30th day of August, 1929, and from the whole of said judgment.

E. W. Hollingsworth, Attorney for Plaintiff.

(Endorsed:) Receipt of copy of the within notice of appeal admitted this 31st day of October, 1929. James E. Lyons, A. Burton Mason, A. L. Whittle, H. C. Booth, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 75] IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated that the foregoing transcript on appeal is correct; that it contains full, true and correct

copies of all the papers therein set forth now on file in the office of the county clerk of the City and County of San Francisco, State of California; that the minute orders therein contained are full, true and correct copies thereof as made and entered in the minutes of the Superior Court; that the said foregoing papers shall constitute the transcript on appeal in this cause and that the appeal may be heard and determined thereon.

Dated December 9th, 1929.

James E. Lyons, A. Burton Mason, A. L. Whittle, Henley C. Booth, Attorneys for Respondent. E. W. Hollingsworth, Attorney for Appellant.

[fol. 76] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 77] [File endorsement omitted]

IN DISTRICT COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO

Civil. No. 7280

LEWIS-SIMAS-JONES COMPANY, Plaintiff and Appellant,

vs.

SOUTHERN PACIFIC COMPANY, Defendant and Respondent

OPINION AND JUDGMENT—Filed June 16, 1930

Appellant brought an action against respondent under the provisions of section 16 of the Interstate Commerce Act (U. S. Code, Title 49) to enforce an award of the Interstate Commerce Commission. This appeal is taken from a judgment in favor of respondent.

In 1923 respondent delivered to appellant at San Francisco three carloads of cow peas which respondent in conjunction with the Southern Pacific Company of Mexico had transported on through bills of lading and joint through rates from Navojoa, Mexico. The shipments were transported by the Mexican carrier from Navojoa, Mexico to

Nogales, Arizona and by respondent from Nogales, Arizona to San Francisco. Respondent collected the freight charges from appellant at San Francisco. These charges were [fol. 78] based upon a joint through rate maintained by the Southern Pacific Company of Mexico and respondent, which joint through rate was published and filed with the Department of Communications and Public Works of the Republic of Mexico and with the Interstate Commerce Commission. In the proceedings instituted by appellant against respondent before the Interstate Commerce Commission the Commission found that such joint through rate was unreasonable and awarded damages to appellant based upon the excess of the rate charged over the rate determined by the Commission to be a reasonable joint through rate. In the present action to enforce the award the trial court found that at all times during which appellant's shipments were in the course of transportation from Navojoa, Mexico to San Francisco the respondent maintained and published in a tariff on file with the Interstate Commerce Commission a rate applicable on carload shipments of cow peas originating at the international boundary line at Nogales, Arizona and destined to San Francisco; that said rate was at all times reasonable and lawful and that said rate was not alleged to be unreasonable in the complaint filed with the Interstate Commerce Commission; that appellant introduced no evidence before the Commission to show that last mentioned rate was other than reasonable and lawful for application upon shipments of cow peas from Nogales, Arizona to San Francisco; and that the Commission made no finding with respect hereto. Respondent's defense was that the Commission was without jurisdiction to make the award for damages. The trial court so concluded and rendered judgment in favor [fol. 79] of respondent. This appeal is taken upon the judgment roll alone and the jurisdictional question is the sole question presented for determination.

The jurisdictional question here involved does not relate to the power of Congress under the Constitution, but to the jurisdiction conferred upon the Interstate Commerce Commission by the Interstate Commerce Act. The transportation over which the Commission has jurisdiction is defined and limited by section 1 of the Act. Paragraph 2

of said section reads in part: "The provisions of this chapter shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States." A similar limitation is found in the language of paragraph 1 of that section. It is conceded by appellants that the Commission has no power under the Act to determine the reasonableness of joint through rates for the purpose of fixing future joint rates on transportation originating in foreign countries. It is further conceded that the jurisdiction of the Commission to award damages extends only to cases where a carrier subject to the provisions of the Act has failed to comply with its duty under the Act. It is contended, however, that the Commission had jurisdiction to award damages in the present case under the authority of News Syndicate Co. v. New York Central Railroad Co., 275 U. S. 179. That decision was handed down during the pendency of the [fol. 80] present litigation and is relied upon both by appellant and respondent on this appeal.

In that case the shipment originated at Thorold, Ontario, Canada, destined for New York City. The Commission found that the joint through rate charged was unreasonable and that the plaintiff in error suffered damages in the amount by which the charges were found to be unreasonable and was entitled to reparation from the carrier that engaged in the transportation of these shipments within the United States. No rates were made or published for the transportation of such shipments from the international boundary to New York City and the Commission did not determine what would be a reasonable rate for this transportation. In the District Court the defendants in error demurred to the complaint on the grounds that the complaint failed to state a cause of action and that the Commission's order was void for want of jurisdiction. The demurrer was sustained and judgment of dismissal entered. After hearing in the Circuit Court of Appeals that court certified certain questions to the United States Supreme Court. The first question certified was:

"1. Where a railroad of the United States and a railroad of the Dominion of Canada unite in the publication of a joint through rate from a point within the Dominion of

Canada to a point within the United States, the rate covering transportation both in Canada and in the United States, has the Interstate Commerce Commission of the United States jurisdiction, on complaint of a shipper or consignee made against the United States railroad alone, to determine the reasonableness of such joint through rate?"

[fol. 81] The answer given was, "Question 1 is answered 'Yes, for the ascertainment of damages.'"

In discussing this question the court said:

"The Interstate Commerce Act applied to the lines that carried, and to the transportation of, the paper from the international boundary to New York City. Sec. (1) and (2). It was the duty of defendants in error to establish just and reasonable rates for that service. Sec. 1 (5), sec. 6 (1) and (7). They failed to make or publish any rate applicable to that part of the transportation. Section 8 makes them liable for damages sustained in consequence of such failure. Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error. Its right to reparation does not depend upon the amounts retained by defendants in error pursuant to agreed divisions. Louisville & Nashville R. R. v. Sloss-Sheffield Co., 269 U. S. 217, 231. Their breach of the statutory duty was a proximate cause of the losses complained of. The failure to establish rates covering the transportation from the international boundary contravened the provisions of the Act and compelled plaintiff in error to pay the through charges complained of. The Commission had jurisdiction to determine whether plaintiff in error was entitled to an 'award of damages under the provisions of this Act for a violation thereof'. Sec. 16 (1). And it was the duty of the Commission to ascertain the damages, the Commission had jurisdiction to determine the [fol. 82] reasonableness of the charges exacted."

The second question certified was:

"2. Where a shipper or consignee of freight shipped to it at a destination in the United States from such point in the Dominion of Canada had paid at destination to the United States railroad the full published joint through freight rate

thereon, has the Interstate Commerce Commission, upon a finding by it that such joint through rate was unreasonble and unjust, but in the absence of a finding that the charges for the transportation is so far as it took place within the United States were unjust and unreasonable, jurisdiction to make an order for the payment of damages to such shipper or consignee in the amount that the entire transportation charges on the basis of the joint through freight rate exceeded the charges which would have been assessed on the basis of the joint through freight rate found by the Commission to have been reasonable?"

The answer given was:

"Question 2 is answered 'yes'." In discussing this question the court in part said, "By their failure to comply with the Act plaintiff in error was compelled to pay charges based on the through rates. On the facts stated, the Commission was authorized to hear the complaint, sec. 13 (1), and had jurisdiction to make the order."

It is apparent that the United States Supreme Court in answering these questions very clearly pointed out that the violation of the Act consisted of the failure to establish rates covering the transportation from the international boundary to New York City. In answering the first question regarding the jurisdiction to determine the rea- [fol. 83] sonableness of the joint through rate, the court qualified its affirmative answer by the words "for the ascertainment of damages". The answer to the second question was in the affirmative but the Commission's authority was decided "on the facts stated". The act was there violated by the carrier's failure to make or publish any rate whatsoever applicable to that part of the transportation between the international boundary and New York City and this violation of the Act compelled the plaintiff to pay the unreasonable joint through rates complained of. In determining the damage proximately caused to the plaintiff in error by this violation of the Act, it was necessary for the Commission to determine the reasonableness of the joint through charges.

In the present case respondent maintained and published a rate as required by the Act on shipments from the international boundary at Nogales, Arizona, to San

Francisco which rate was not found to be unreasonable by the Commission. The appellant was not compelled to pay the joint through rate by reason of any violation of the Act on the part of respondent. The jurisdiction of the Commission to award damages must be predicated upon a violation of the Act and where there is no evidence to show that there has been such violation, the Commission is without jurisdiction to make an award of damages.

The question relating to the judgment awarding to respondent its costs has now become moot as respondent has filed in the trial court a satisfaction of the judgment for costs and a certified copy thereof has been filed with [fol. 84] this court.

The judgment is affirmed.

Spence, J.

We concur: Sturtevant, J.; Nourse, P. J.

[fol. 85] [File endorsement omitted]

IN SUPREME COURT OF CALIFORNIA. IN BANK

S. F. No. 14014. No. 7280

LEWIS-SIMAS-JONES COMPANY

vs.

SOUTHERN PACIFIC COMPANY

ORDER DENYING PETITION FOR HEARING—Filed in District Court of Appeal, Aug. 14, 1930

By the COURT:

The Appellant's petition to have the above entitled cause heard and determined by this Court after judgment in the District Court of Appeal of the First Appellate District, Division Two, is denied.

Dated this 14th day of August, 1930.

Waste, Chief Justice.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 86] [File endorsement omitted]

IN DISTRICT COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO

Civil. No. 7280

LEWIS-SIMAS-JONES COMPANY, Plaintiff and Appellant,

vs.

SOUTHERN PACIFIC COMPANY, Defendant and Respondent

ORDER DENYING REHEARING—Filed July 15, 1930

By the COURT:

The Petition for a Rehearing filed in the above entitled cause is hereby denied.

Dated this 15th day of July, 1930.

Nourse, Presiding Justice.

[fol. 87] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 88] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 1, 1930

The petition herein for a writ of certiorari to the District Court of Appeal, First Appellate District, State of California, is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,442. California District Court of Appeal, First Appellate District. Term No. 520. Lewis-Simas-Jones Company, petitioner, vs. Southern Pacific Company. Petition for a writ of certiorari and exhibit thereto. Filed October 21, 1930. File No. 35,442.

FILE COPY

OCT 21 1

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1930

No. 520

LEWIS-SIMAS-JONES COMPANY,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT THEREOF.

ERNEST CLEVE,
Mills Building, San Francisco,
Attorney for Petitioner.

Subject Index

Page

Petition for writ of certiorari 1

Brief in support of petition for writ of certiorari 6

The respondent violated the Interstate Commerce Act by failing to maintain a reasonable or any rate applicable to the transportation within the United States of the shipments in issue 6

Collection by the respondent of an unreasonable joint through rate which included in it transportation within the United States of property originating in a foreign country and destined to a point in the United States was a violation of the Interstate Commerce Act 12

Table of Authorities Cited

Pages

Armour Packing Co. v. U. S., 209 U. S. 56, 81 10

Atlantic Fish Co. v. C. N. R., 148 I. C. C. 533 ..... 9, 11

Black Horse Tobacco Co. v. I. C. R. R. Co., 17 I. C. C. 588 11

Boston & Maine R. Co. v. Hooker, 233 U. S. 97, 110 10

B. & O. S. W. R. R. Co. v. Settle, 260 U. S. 166 9

International Nickel Co v. Director General, 66 I. C. C. 627 11

Charles B. Justice Co. v. Holton I. R. Co., 153 I. C. C. 673 9, 11

Larrowe Milling Co. v. W. & L. E. R. R., 52 I. C. C. 145 ... 11

L. & N. R. R. Co. v. Maxwell, 237 U. S. 94, 97 10

Monarch Paper Co. v. C. P. Ry. Co., 53 I. C. C. 620 11

News Syndicate Co. v. N. Y. C., 275 U. S. 179 .....4, 6, 11, 12

Rub-No-More Co. v. Director General, 69 I. C. C. 23 12

San Diego Oil Products Corp. v. Holton I. R. Co., 164 I. C. C. 505 .....11, 12

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1930

No.

LEWIS-SIMAS-JONES COMPANY,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Now comes Lewis-Simas-Jones Company and respectfully petitions this Court to grant a writ of certiorari to the District Court of Appeal of the State of California, First Appellate District, Division Two, to remove therefrom, for review here, the record in the case therein No. 7280, wherein petitioner is plaintiff

and appellant and Southern Pacific Company is defendant and respondent, and states:

The complaint in this action was filed in the Superior Court of the City and County of San Francisco, State of California, and alleged that the respondent had delivered to petitioner at San Francisco, three carloads of cow peas, which the respondent in conjunction with the Southern Pacific Railroad Company of Mexico had transported under through bills of lading and joint through rate of $1.33 per 100 lbs. from Navojoa, Mexico; that the said joint through rate was named in a tariff filed with the Interstate Commerce Commission; that the said joint through rate was unjust and unreasonable to the extent that it exceeded 94¢ per 100 lbs.; that the Interstate Commerce Commission had duly made and entered an order directing respondent to pay petitioner a certain sum as reparation; and that the respondent had not paid. (R. 3, 4.) None of these allegations were denied in the answer. Respondent pleaded a variety of facts in avoidance, all of them directed to the ultimate point that the Commission was without jurisdiction. (R. 12 to 19.) The only fact pleaded by respondent which now appears material is the allegation in an amendment to the answer (R. 56) that respondent "maintained a rate applicable on cow peas, carloads, from the said international boundary line at Nogales, Arizona, to San Francisco, California, which rate would have been applicable for the transportation within the United States of the shipments mentioned in the complaint had the consignors or owners elected to consign the same to said international boundary line and had thence reshipped said cow peas from said

international boundary line to San Francisco; and that the Interstate Commerce Commission has not at any time found said local rate from the international boundary at Nogales, Arizona, to San Francisco, California, to be or to have been unjust or unreasonable, or otherwise in violation of law." There was no allegation in the answer as amended that the respondent maintained a reasonable or any rate applicable to the transportation within the United States of the shipments in issue which moved on through bills of lading from Navojoa to San Francisco.

The trial Court found that the respondent maintained and published a rate of $1.14½ per 100 lbs. on carload shipments of cow peas originating at Nogales, Arizona, and destined to San Francisco; that this rate was applicable to carload shipments of cow peas originating at the point where the lines of the Southern Pacific Railroad Company of Mexico and respondent touch the international boundary line at Nogales, Arizona, and destined to San Francisco; and was likewise applicable upon carload shipments of cow peas loaded into cars at any point upon or adjacent to the boundary line within the limits of the respondent's railroad yards at Nogales, Arizona, and destined to San Francisco; that the shipments in issue could have been transported by other means than by railroad to a point at the boundary line and there loaded into cars for movement over respondent's line; that the rate applicable upon shipments from such point upon the boundary line to San Francisco was the said rate of $1.14½ per 100 lbs.; that said rate of $1.14½ was reasonable and lawful for application upon carload shipments of cow peas from Nogales,

Arizona, including such shipments as might be loaded at any place within the railroad yard limits at that point, destined to San Francisco; and that the Interstate Commerce Commission had made no finding and had had no evidence before it regarding the reasonableness of said rate of $1.14½. The trial Court concluded as a matter of law that the Commission was without jurisdiction. (R. 66 to 69.) Petitioner appealed to the District Court of Appeal of the State of California, First Appellate District, the judgment was affirmed (289 Pac. 643), and a petition for rehearing was denied on July 15, 1930. Petitioner then applied to the Supreme Court of the State of California for a hearing, in accordance with the laws of the State of California, which application was denied on August 14, 1930.

The reasons relied on for the allowance of the writ are as follows:

First: The decision of the Court below is contrary to the decision of this Court in *News Syndicate Co. v. N. Y. C.*, 275 U. S. 179.

Second: The decision of the Court below denies to the Interstate Commerce Commission a jurisdiction which that Commission has regularly asserted and exercised for more than twenty years and is still asserting and exercising. A decision from this Court upon the points involved is necessary to settle the conflict between the Commission and the State Courts of California with regard to the Commission's jurisdiction.

Third: The decision of the Court below prevents the exercise by the Interstate Commerce Commission

of any effective control over charges maintained or collected by railroads in the United States for the transportation within the United States of property which originates in a foreign country and is destined to a point in the United States, or which originates in the United States and is destined to a point in a foreign country, or which originates in the United States and is transported through a foreign country to a destination in the United States.

Dated, San Francisco,
October 11, 1930.

Respectfully submitted,
ERNEST CLEWE,
Attorney for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1930

No.

LEWIS-SIMAS-JONES COMPANY,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE RESPONDENT VIOLATED THE INTERSTATE COMMERCE ACT BY FAILING TO MAINTAIN A REASONABLE OR ANY RATE APPLICABLE TO THE TRANSPORTATION WITHIN THE UNITED STATES OF THE SHIPMENTS IN ISSUE.

The pertinent provisions of paragraphs 1, 2 and 5 of Section 1, and paragraphs 6 and 7 of the Interstate Commerce Act are quoted in appendix to this brief.

In *News Syndicate Co. v. N. Y. C.*, 275 U. S. 179 the following questions of law were certified to this

Court by the United States Circuit Court of Appeals for the Seventh Circuit:

"1. Where a railroad of the United States and a railroad of the Dominion of Canada unite in the publication of a joint through rate from a point within the Dominion of Canada to a point within the United States, the rate covering transportation both in Canada and in the United States, has the Interstate Commerce Commission of the United States jurisdiction, on complaint of a shipper or consignee made against the United States railroad alone, to determine the reasonableness of such joint through rate?

"2. Where a shipper or consignee of freight shipped to it at a destination in the United States from such point in the Dominion of Canada has paid at destination to the United States railroad the full published joint through freight rate thereon, has the Interstate Commerce Commission, upon a finding by it that such joint through rate was unreasonable and unjust, but in the absence of a finding that the charges for the transportation in so far as it took place within the United States were unjust and unreasonable, jurisdiction to make an order for the payment of damages to such shipper or consignee in the amount that the entire transportation charges on the basis of the joint through freight rate exceeded the charges which would have been assessed on the basis of the joint through freight rate found by the Commission to have been reasonable?

"3. When the Interstate Commerce Commission had made such an order against the United States carrier alone for the payment of damages

arising from its finding of the unreasonableness of such published joint through rate, can a suit thereon, under section 16 of the Interstate Commerce Act, be maintained solely against the United States carrier?

"4. Did the District Court err in sustaining the demurrer to the said petition?"

We quote the following verbatim from the decision of this Court:

"Question 1 is answered 'Yes, for the ascertainment of damages.'

Question 2 is answered 'Yes.'

Question 3 is answered 'Yes.'

Question 4 is not answered."

These questions and answers, standing alone, afford a complete and affirmative answer to the Commission's jurisdiction in this case. However, this Court's conclusions in the case cited were reached in the light of the fact that the carriers there had violated the Interstate Commerce Act by failing to make or publish any rate applicable to that portion of the transportation there involved which was within the United States. In the instant case the respondent maintained a rate on cow peas from the international boundary line to San Francisco, but your petitioner claims that as a matter of law this rate was not applicable to the transportation within the United States of the shipments in issue or to the transportation within the United States of any shipments of cow peas originating at Navojoa, Mexico, and transported on through

bills of lading via Nogales to San Francisco. The allegation in the amendment to the answer is that this rate from the boundary would have been applicable if the shipments had been consigned to and from the international boundary line on separate bills of lading, necessarily implying thereby that this rate from the boundary was not applicable to the transportation within the United States of shipments moving on through bills of lading. (R. 56.) Likewise, there is no finding or expressed conclusion by the trial Court or by the District Court of Appeal that this rate from the boundary was applicable to the transportation within the United States of the shipments in issue. The reason petitioner contends that the rate from the boundary line to San Francisco was not as a matter of law applicable to the transportation within the United States of shipments moving on through bills of lading from Navojoa to San Francisco is that the respondent had filed with the Interstate Commerce Commission a joint through rate for such shipments, and where a joint through rate is established no other rate can be applied. (*B. & O. S. W. R. R. Co. v. Settle,* 260 U. S. 166.) The case cited did not involve international joint through rates, but the underlying principle involved is nevertheless the same, and the Interstate Commerce Commission holds that the same rule is applicable to such rates.

Charles B. Justice Co. v. Holton I. R. Co., 153 I. C. C. 673;

Atlantic Fish Co. v. C. N. R., 148 I. C. C. 533.

Furthermore, this Court has repeatedly said that the central and controlling purpose of the Act was

that there should be only one rate for similar carriage of freight, which rate must be charged.

Armour Packing Co. v. U. S., 209 U. S. 56, 81;
Boston & Maine R. Co. v. Hooker, 233 U. S. 97. 110;
L. & N. R. R. Co. v. Maxwell, 237 U. S. 94, 97.

It is obvious that since the respondent did not charge the rate of $1.14½ for the transportation within the United States of the shipments in issue, that rate could not have been applicable to that transportation. There could have been but one applicable rate, and if the rate of $1.14½ had been applicable the respondent would have been in violation of the Act by failing to charge it.

Your petitioner contends that there are no exceptions whatever to the duty of a railroad to maintain and to charge a reasonable rate for all property which it may transport within the United States, when originating in a foreign country and destined to a point in the United States. If a railroad in the United States engages in the transportation on through bills of lading of property originating in a foreign country and destined to a point in the United States, that railroad is bound to maintain and to charge a reasonable rate applicable to the transportation within the United States of such shipments, and it is not a full and complete compliance with the Act for a carrier to establish a reasonable rate which is applicable to other shipments, but not applicable to shipments which that carrier is engaged in transporting on through bills of lading. Having failed to maintain a reasonable rate applicable to the transportation

within the United States of the shipments in issue, the respondent here was guilty of the same violation of the Act of which the carriers were guilty in the *News Syndicate Co.* case. The fact that respondent maintained a reasonable rate for the transportation within the United States of other shipments, not transported on through bills of lading, does not alter the fact that the respondent had engaged in the business of transporting shipments on through bills of lading and was, therefore, bound to maintain and to charge a reasonable rate applicable to the transportation within the United States of such shipments.

In conclusion upon this point, the Interstate Commerce Commission holds that under the decision of this Court in the *News Syndicate Co.* case, the Commission has jurisdiction to award reparation in cases of the kind here presented.

Atlantic Fish Co. v. C. N. R., 148 I. C. C. 533;
Charles B. Justice Co. v. Holton I. R. Co., 153 I. C. C. 673;
San Diego Oil Products Corp. v. Holton I. R. Co., 164 I. C. C. 505.

This jurisdiction is one which the Commission has regularly exercised for over twenty years.

Black Horse Tobacco Co. v. I. C. R. R. Co., 17 I. C. C. 588;
Larrowe Milling Co. v. W. & L. E. R. R., 52 I. C. C. 145;
Monarch Paper Co. v. C. P. Ry. Co., 53 I. C. C. 620;
International Nickel Co. v. Director General, 66 I. C. C. 627;

Rub-No-More Co. v. Director General, 69 I. C. C. 23.

Prior to the decision of this Court in the *News Syndicate Co.* case there was considerable disagreement among the members of the Commission with regard to its jurisdiction in these cases, the majority however always holding in favor of the Commission's jurisdiction, but since the decision in the *News Syndicate Co.* case we find only one dissenting opinion, that of Commissioner Woodlock, in *San Diego Oil Products Corp. v. Holton I. R. Co.*, 164 I. C. C. 505. Commissioner Woodlock dissented without any expression of the views or reasoning upon which his dissent was based.

COLLECTION BY THE RESPONDENT OF AN UNREASONABLE JOINT THROUGH RATE WHICH INCLUDED IN IT TRANSPORTATION WITHIN THE UNITED STATES OF PROPERTY ORIGINATING IN A FOREIGN COUNTRY AND DESTINED TO A POINT IN THE UNITED STATES WAS A VIOLATION OF THE INTERSTATE COMMERCE ACT.

The decision which we seek to have reviewed is predicated upon the conclusion of the Court below that the respondent had not violated the Interstate Commerce Act in any respect whatever (289 Pac. 645). The respondent has argued that your petitioner and all shippers are given an opportunity to secure a reasonable rate for transportation within the United States so long as the carriers maintain a reasonable rate from the international boundary line to the destination in the United States. In the *News Syndicate Co.* case this Court held that the carriers within the United States were bound to accord shippers that

opportunity, but this Court did not say or infer that the obligations of the carriers within the United States ended there. It is here we believe that the Court below fell into its outstanding error in interpreting the decision in the *News Syndicate Co.* case as holding that the sum total of the obligations of the carriers in the United States is to maintain lawful rates to and from the international boundary line without regard to whether the rates actually charged are lawful. The Interstate Commerce Act goes further than merely to require that the carriers in the United States shall afford shippers an opportunity to secure lawful rates. The Act places the burden squarely upon the carriers themselves of seeing to it that in every case the charges actually collected are lawful, regardless of how many opportunities the shipper may have had to secure lawful rates. Paragraph 5 of Section 1 requires not only that the carriers shall maintain reasonable charges for services "to be rendered" but also requires that charges shall be reasonable for services "rendered." A carrier may comply with its obligation to maintain lawful rates for services "to be rendered" merely by according shippers an opportunity to secure lawful rates, but the carrier has not fulfilled its obligation to make a lawful charge for services "rendered" unless the charge actually made for that service is lawful.

If an international joint through rate, established by an American railroad in conjunction with a foreign carrier, is free from the requirements of Paragraph 5 of Section 1 of the Act, then such a rate is free from all of the requirements of the Act. It

would obviously be impossible to say that such a rate is free from the requirements of Paragraph 5 of Section 1 of the Act but nevertheless subject to the requirements of Paragraph 1 of Section 3 or Paragraphs 6 and 7 of Section 6. Paragraph 1 of Section 3, to which we have referred, prohibits the granting of undue preferences or advantages as between persons, localities or commodities, and Paragraphs 6 and 7 of Section 6 require carriers subject to the Act to publish and file their rates with the Commission and to collect the rates so published and filed. No distinction with regard to the Commission's jurisdiction, can be made as between transportation of imports, transportation of exports, and transportation of property originating in the United States and transported through a foreign country to a destination in the United States. We will here cite illustrations of some of the things which result, if it be held that these international joint through rates are not subject to the pertinent requirements of the Act. First, railroads in the United States may lawfully join with Canadian railroads in through rates from St. Louis to Montreal which are grossly prejudicial in comparison with rates from Chicago to Montreal. In such a situation, of what practical use would it be that the rates from Chicago and from St. Louis to the international boundary line might be entirely free from undue prejudice, if the rates actually charged were prejudicial? Second, railroads in the United States may lawfully join in through rates from Montreal to St. Louis on shipments consigned to X Co. with higher rates from Montreal to St. Louis on shipments consigned to Y Co. Of what use would

it be that the rates from the international boundary line to St. Louis might be lawful in every respect if the rates actually charged to Y Co. were higher than the rates charged to X Co.? Third, the Commission may wish to fix minimum rates from Seattle, Wash., to Detroit, Mich., but will be unable to effectually exercise its powers in that direction because of the availability of routes from Seattle to Detroit which operate through Canada, inasmuch as joint through rates over such routes would be free from the requirements of the Act or the jurisdiction of the Commission. In such a case, of what practical use would it be that the rates from Seattle to the point where the shipments entered Canada and to Detroit from the point where the shipments again entered the United States were entirely lawful if the carriers in the United States were nevertheless free to join in through rates from Seattle to Detroit, through Canada, which were free from the requirements of the Act? Fourth, railroads in the United States may join with carriers in foreign countries in secret joint through rates between points in foreign countries and points in the United States, inasmuch as these joint through rates would be free from the requirements of Paragraphs 6 and 7 of Section 6 of the Act relative to publishing and filing rates with the Commission. Fifth, a railroad in the United States may lawfully join with carriers in Mexico in the establishment and filing with the Interstate Commerce Commission of a rate of $1.33 per 100 lbs. on cow peas from Navojoa to San Francisco, but on arrival in San Francisco the railroad may collect from the consignee either more or less than that amount, and

the Interstate Commerce Commission would be powerless to do anything in the matter. If the collection of an unreasonable joint through international rate, filed with the Interstate Commerce Commission, does not involve a violation of Paragraph 5 of Section 1 of the Act, then the collection of a rate which was more or less than the rate named in the tariff filed with the Commission could not be held to be a violation of Paragraph 7 of Section 6 of the Act.

From these few illustrations, it should be apparent that if the Court below is correct in its conclusion that joint through international rates, when established, which include in them transportation within the United States by carriers subject to the Act, are free from the pertinent requirements of the Act, the Interstate Commerce Commission can exercise no effective control over the charges of the carriers in the United States engaged in the transportation of this country's foreign commerce. The law does not require the doing of a vain and futile thing, and determination of whether or not the rates maintained by the carriers within the United States to or from international boundary lines are lawful would be wholly vain and futile in seeking to determine whether the charges actually collected by railroads in the United States under international joint through rates are or are not lawful.

Dated, San Francisco,
October 11, 1930.

Respectfully submitted,

ERNEST CLEWE,

Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

State of California,
City and County of San Francisco.—ss.

Ernest Clewe being first duly sworn deposes and says: I am an attorney and counsellor of the Supreme Court of the United States; I am the attorney for the petitioner named in the foregoing petition for writ of certiorari; the allegations of said petitioner are true, as I verily believe; the points raised therein are in my opinion meritorious; said petitioner has not been filed for the purpose of delay.

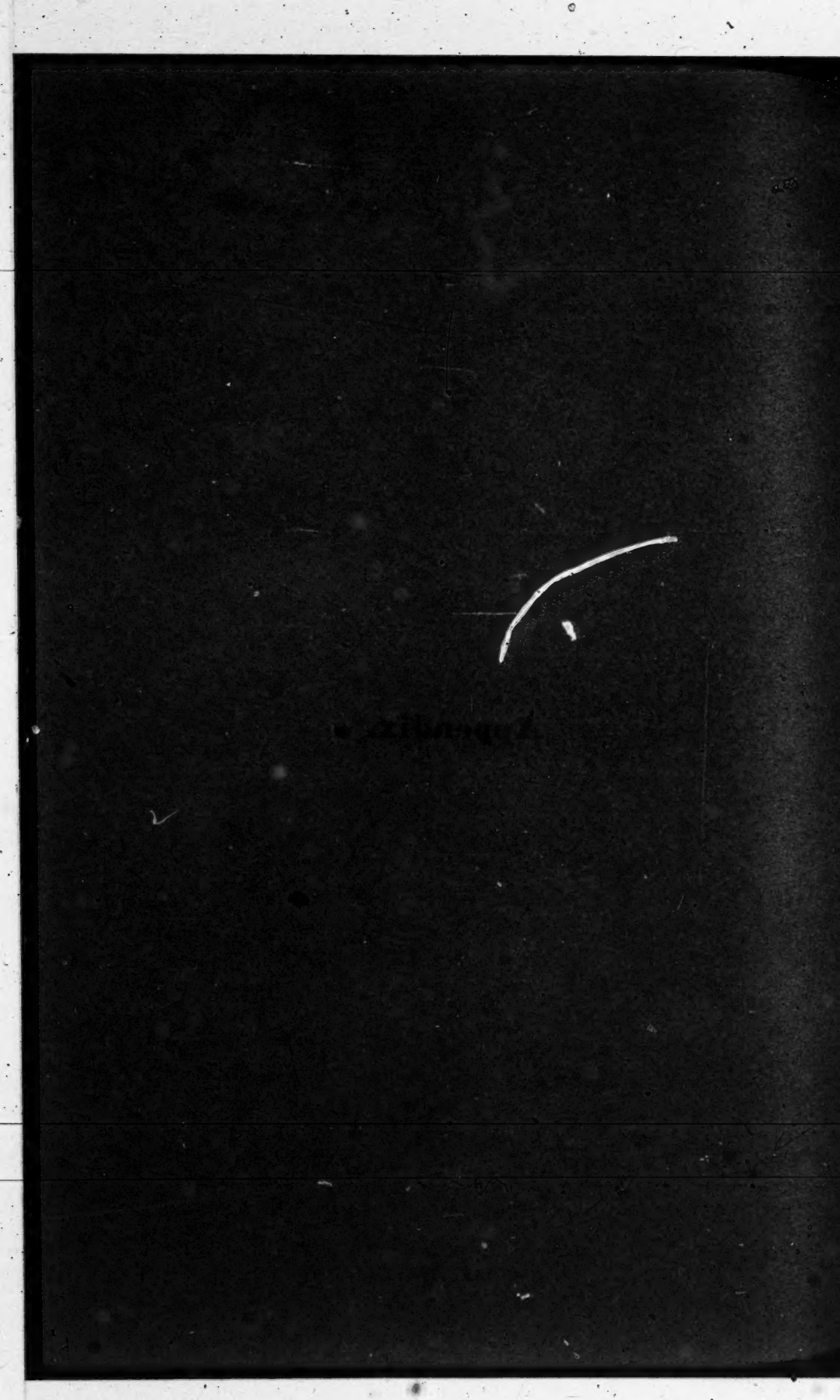
ERNEST CLEWE.

Subscribed and sworn to before me this 11th day of October, 1930.

(Seal) Mignon Jacobi,
Notary Public in and for the City and County of San Francisco, State of California.

(Appendix Follows.)

Appendix.



Appendix

Paragraphs 1, 2 and 5 of Section 1 of the Interstate Commerce Act, so far as germane to this proceeding, read as follows:

> "Sec. 1, Para. 1. That the provisions of this Act shall apply to common carriers engaged in the transportation of passengers or property wholly by railroad * * * from or to any place in the United States to or from a foreign country, but only in so far as such transportation * * * takes place within the United States.
>
> Sec. 1, Para. 2. The provisions of this Act shall also apply to such transportation of passengers and property, * * * but only in so far as such transportation or transmission takes place within the United States.
>
> Sec. 1, Para. 5. All charges made for any service rendered or to be rendered in the transportation of passengers or property * * * or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Paragraphs 1 and 7 of Section 6 of the Interstate Commerce Act read as follows:

> "Sec. 6, Para. 1. That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and points on the route of any other carrier

by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation and facilities defined in this Act.

"Sec. 6, Para. 7. No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor

shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariff than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Due service and receipt of a copy of the within is hereby admitted

this_____day of October, 1930.

_____

_____

_____

Attorneys for Respondent.

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CHARLES ELMORE CROPLEY
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1930

No. 520

LEWIS-SIMAS-JONES COMPANY,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,
Respondent.

BRIEF FOR PETITIONER.

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Subject Index

	Page
Statement of the case	1
Argument	4
The respondent violated the Interstate Commerce Act by failing to maintain a reasonable or any rate applicable to the transportation within the United States of the shipments in issue	4
The respondent violated the Interstate Commerce Act by failing to charge a reasonable rate for the transportation within the United States of the shipments in issue	10
The decision of the court below denies to the Interstate Commerce Commission a jurisdiction which that Commission has regularly asserted and exercised for more than twenty years and is still asserting and exercising	12
The decision of the court below prevents the exercise by the Interstate Commerce Commission of any effective control over charges maintained or collected by railroads for the transportation within the United States of property moving in international commerce	14
Conclusion	19

Table of Authorities Cited

	Pages
Armour Packing Co. v. U. S., 209 U. S. 56, 81	9
Atlantic Fish Co. v. C. N. R., 148 I. C. C. 533	9, 12
Black Horse Tobacco Co. v. I. C. R. R. Co., 17 I. C. C. 588	12
Boston & Main R. Co. v. Hooker, 233 U. S. 97, 110	9
B. & O. S. W. R. R. Co. v. Settle, 260 U. S. 166	9
International Nickel Co. v. Director General, 66 I. C. C. 627	12
Charles B. Justice Co. v. Holton I. R. Co., 153 I. C. C. 673	9, 12
Larrowe Milling Co. v. W. & L. E. R. R., 52 I. C. C. 145	12
L. & N. R. R. Co. v. Maxwell, 237 U. S. 94, 97	9
L. & N. R. Co. v. Sloss, Sheffield Co., 269 U. S. 217, 231	11
Monarch Paper Co. v. C. P. Ry. Co., 53 I. C. C. 620	12
News Syndicate Company v. N. Y. C., 275 U. S. 179	5, 11
Rub-No-More Co. v. Director General, 69 I. C. C. 23	12
San Diego Oil Products Corp. v. Holton I. R. Co., 164 I. C. C. 505	12

In the Supreme Court
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OCTOBER TERM, 1930

No. 520

LEWIS-SIMAS-JONES COMPANY,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,
Respondent.

BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

The complaint herein was filed to enforce payment of a reparation award by the Interstate Commerce Commission. The defendant had collected from the plaintiff at San Francisco, Calif., a rate of $1.33 per 100 lbs. upon three carloads of cow peas which the respondent, in conjunction with the Southern Pacific Railroad of Mexico, had transported under through bills of lading from Navojoa, Mexico to San Francisco. This joint through rate was named in a tariff filed with the Commission.

The complaint alleged and the answer did not deny that this rate of $1.33 was unjust and unreasonable to the extent that it exceeded 94¢ per 100 lbs., and that the Commission so found. (R. 3, 4.) The claimed defense is that the Commission was without jurisdiction. The only fact pleaded by respondent which now appears material is an allegation in an amendment to the answer (R. 5, 6) that respondent "maintained a rate applicable on cow peas, carloads, from the said international boundary line at Nogales, Ariz., to San Francisco, Calif., which rate would have been applicable for the transportation within the United States of the shipments mentioned in the complaint had the consignors or owners elected to consign the same to said international boundary line and had thence reshipped said cow peas from said international boundary line to San Francisco, and that the Interstate Commerce Commission has not at any time found said local rate from the international boundary at Nogales, Ariz., to San Francisco, Calif., to be or to have been unjust or unreasonable, or otherwise in violation of law."

The trial court found that the respondent maintained and published a rate of $1.14½ per 100 lbs. on carload shipments of cow peas originating at Nogales, Ariz., and destined to San Francisco; that this rate was applicable to carload shipments of cow peas originating at the point where the lines of the Southern Pacific Railroad Company of Mexico and respondent touch the international boundary line at Nogales, Ariz., and destined to San Fran-

cisco; and was likewise applicable upon carload shipments of cow peas loaded into cars at any point upon or adjacent to the boundary line within the limits of the respondent's railroad yards at Nogales, Ariz., and destined to San Francisco; that the shipments in issue could have been transported by other means than by railroad to a point at the boundary line and there loaded into cars for movement over respondent's line; that the rate applicable upon shipments from such point upon the boundary line to San Francisco was the said rate of $1.14½ per 100 lbs.; that said rate of $1.14½ was reasonable and lawful for application upon carload shipments of cow peas from Nogales, Ariz., including such shipments as might be loaded at any place within the railroad yard limits at that point, destined to San Francisco; and that the Interstate Commerce Commission had made no finding and had had no evidence before it regarding the reasonableness of said rate of $1.14½. The trial court concluded as a matter of law that the Commission was without jurisdiction. (R. 66 to 69.) On appeal the judgment was affirmed, the Appellate Court concluding that the facts, as stated above, did not constitute any violation of the Interstate Commerce Act by the respondent. (R. 81.)

ARGUMENT.

THE RESPONDENT VIOLATED THE INTERSTATE COMMERCE ACT BY FAILING TO MAINTAIN A REASONABLE OR ANY RATE APPLICABLE TO THE TRANSPORTATION WITHIN THE UNITED STATES OF THE SHIPMENTS IN ISSUE.

As premises upon which argument in this brief will be predicated we state the following propositions of law:

1. The Interstate Commerce Act was applicable to the transportation within the United States of the shipments in issue. Para. (1) and (2), Sec. 1.

2. It is the duty of every common carrier by railroad to publish and file with the Interstate Commerce Commission a reasonable rate applicable to transportation within the United States of all property transported, which originates in a foreign country and is destined to a point in the United States. Para. (1) and (7), Sec. 6; Para. (5), Sec. 1.

3. A common carrier by railroad which transports within the United States property which originates in a foreign country and is destined to a point in the United States, must charge and collect for the transportation service within the United States the identical rate which it has published and filed in fulfillment of the duty above stated, and any rate which the carrier *may* collect for such service it *must* collect for that service. Para. (7), Sec. 6.

4. It is unlawful for a common carrier by railroad to collect any unjust or unreasonable

charge for a transportation service rendered within the United States in the carriage of property originating in a foreign country and destined to a point in the United States. Para. (5), Sec. 1.

The pertinent provisions of the Act are quoted in appendix to petition for writ of certiorari and brief in support thereof. No argument is here offered in support of these propositions of law because we believe them to be self evident from the terms of the statute.

In stating these propositions, as well as in all of the argument which follows, we purposely disregard exceptions in the Act, not pertinent here, which authorize services at free or reduced rates for the United States, state or municipal governments, etc. Save those provisions, we assert the foregoing propositions of law to be absolute and subject to no exceptions whatsoever.

In *News Syndicate Company v. N. Y. C.*, 275 U. S. 179, the following questions of law were certified to this Court:

"1. Where a railroad of the United States and a railroad of the Dominion of Canada unite in the publication of a joint through rate from a point within the United States, the rate covering transportation both in Canada and in the United States, has the Interstate Commerce Commission of the United States jurisdiction, on complaint of a shipper or consignee made against the United States railroad alone, to determine the reasonableness of such joint through rate?

2. Where a shipper or consignee of freight shipped to it at a destination in the United States from such point in the Dominion of Canada has paid at destination to the United States railroad the full published joint through freight rate thereon, has the Interstate Commerce Commission, upon a finding by it that such joint through rate was unreasonable and unjust, but in absence of a finding that the charges for the transportation in so far as it took place within the United States were unjust and unreasonable, jurisdiction to make an order for the payment of damages to such shipper or consignee in the amount that the entire transportation charges on the basis of the joint through freight rate exceeded the charges which would have been assessed on the basis of the joint through freight rate found by the Commission to have been reasonable?

3. When the Interstate Commerce Commission had made such an order against the United States carrier alone for the payment of damages arising from its finding of the unreasonableness of such published joint through rate, can a suit thereon, under section 16 of the Interstate Commerce Act, be maintained solely against the United States carrier?

4. Did the District Court err in sustaining the demurrer to the said petition?"

We quote the following verbatim from the decision of this Court:

"Question 1 is answered 'Yes, for the ascertainment of damages.'

Question 2 is answered 'Yes.'

Question 3 is answered 'Yes.'
Question 4 is not answered."

These questions and answers, standing alone, afford a complete and affirmative answer to the Commission's jurisdiction in this case. However, this Court's conclusions in the case cited were reached in the light of the fact that the carriers there had violated the Interstate Commerce Act by failing to make or publish any rate applicable to that portion of the transportation there involved which was within the United States. The allegation in the amendment to the answer that respondent "maintained a rate applicable on cow peas, carloads, from the said international boundary line at Nogales, Ariz., to San Francisco, Calif., which rate would have been applicable for the transportation within the United States of the shipments mentioned in the complaint had the consignors or owners elected to consign the same to said international boundary line and had thence reshipped said cow peas from said international boundary line to San Francisco," was apparently intended to differentiate the facts in the case at bar from the facts in the *News Syndicate Co.* case. If so intended, the allegation fails of its purpose in view of the fact that the respondent had engaged in the transportation within the United States of property moving on through bills of lading from a point in a foreign country to a destination in the United States, and having engaged in such transportation, it was the respondent's duty to maintain a reason-

able rate applicable thereto. The respondent did not comply fully with its obligations in this respect merely by maintaining a rate which "would have been applicable" if the facts had been different. The respondent's duty was to maintain a rate which *was* applicable to the transportation within the United States of these very shipments. The trial court did not find that the respondent had maintained any rate which was applicable to the transportation within the United States of the shipments in issue, but found that the respondent maintained a rate applicable to the transportation within the United States of various other classes of shipments from the international boundary line to San Francisco. (R. 66 to 69.) Nor does the decision of the Court below on appeal contain any expression to the effect that the respondent had maintained a rate which was applicable to the transportation within the United States of the shipments in issue. Although the respondent maintained a rate on cow peas from the international boundary line to San Francisco which, it may be assumed for the purposes of this case, was applicable to the transportation within the Untied States of the various classes of shipments described in the amendment to the answer and in the findings of the trial court, that rate was not applicable to the transportation within the United States of the shipments in issue, because the respondent had filed with the Interstate Commerce Commission a joint through rate via the route of movement from Navojoa, Mexico to San Francisco, and where a joint through rate is estab-

lished no other rate can be applied. *B. & O. S. W. R. R. Co. v. Settle,* 260 U. S. 166. The Interstate Commerce Commission holds that this rule is applicable to international joint through rates of the nature here involved. *Charles B. Justice Co. v. H. I. R. Co.,* 153 I. C. C. 673; *Atlantic Fish Co. v. C. N. R.,* 148 I. C. C. 533. If respondent's argument to the contrary is sound, let us say that on the same date two identical shipments of cow peas are made on through bills of lading from Navojoa, Mex., one consigned to X Co. at San Francisco, another consigned to Y Co. at San Francisco. There is a through rate published and filed with the Commission for that transportation from Navojoa to San Francisco, but nevertheless, as we understand respondent's argument, X Co. might pay the through rate, Y Co. might pay the sum of the rates from and to the international boundary line, and both transactions would be entirely lawful. The respondent thus argues that there may be two rates in effect at the same time for an identical transportation service, either one of which may be lawfully charged, thereby defeating what this Court has repeatedly stated to be the central and controlling purpose of the Act, that there shall be only one rate for similar carriage of freight, which rate must be charged.

Armour Packing Co. v. U. S., 209 U. S. 56, 81;

Boston & Maine R. Co. v. Hooker, 233 U. S. 97, 110;

L. & N. R. R. Co. v. Maxwell, 237 U. S. 94, 97.

THE RESPONDENT VIOLATED THE INTERSTATE COMMERCE ACT BY FAILING TO CHARGE A REASONABLE RATE FOR THE TRANSPORTATION WITHIN THE UNITED STATES OF THE SHIPMENTS IN ISSUE.

It is admitted that the through charge collected at San Francisco for the transportation from Navojoa, Mex., was unreasonable. This charge included in it a transportation service within the United States. Para. (5) of Sec. 1 of the Act was applicable to that service and required that "all charges made for any service rendered or to be rendered in the transportation of passengers or property * * * or in connection therewith shall be just and reasonable." When a carrier subject to the Act has collected a charge which includes in it a service which is subject to the Act, there must be some practicable method of determining whether that charge is reasonable. The requirements of the Act are directed to the "charges made" and surely the Commission, in seeking to determine whether the "charges made" are in accordance with the requirements of the Act, has jurisdiction to inquire into and determine the reasonableness of the identical charge which was collected. True, since a joint through rate is a unit in itself, necessarily the Commission's inquiry and determination must be directed to the entire charge, which includes in it transportation both within and without the boundaries of the United States. This Court held in the *News Syndicate Co.* case, supra, that the Commission may make such inquiry and determination in awarding damages for violation of the Act. The measure of damages for the exaction of an un-

reasonable charge is the difference between the rate collected and the rate found to be reasonable, and the claimant's right to reparation does not depend upon the amounts retained by carriers pursuant to agreed divisions. *L. & N. R. Co. v. Sloss, Sheffield Co.*, 269 U. S. 217, 231. This rule is applicable to charges collected under an international joint through rate. *News Syndicate Co. v. N. Y. C. R. R. Co.*, supra. If the respondent's contentions, as we understand them, are sound, the result is that a carrier operating within the United States, by collecting a joint through rate for service which includes transportation within the United States subject to the Act, thereby creates a condition which deprives the Interstate Commerce Commission of any power to determine whether the charges made are or are not reasonable. Stated otherwise, although the Act requires that all charges made by a railroad for transportation within the United States of property originating in a foreign country and destined to a point in the United States shall be just and reasonable, the respondent contends that a carrier within the United States may preclude any determination of the reasonableness of the charge made by the simple expedient of obscuring it through the collection of an international joint through rate.

THE DECISION OF THE COURT BELOW DENIES TO THE INTERSTATE COMMERCE COMMISSION A JURISDICTION WHICH THAT COMMISSION HAS REGULARLY ASSERTED AND EXERCISED FOR MORE THAN TWENTY YEARS AND IS STILL ASSERTING AND EXERCISING.

The Commission, in decisions dating at least from February 17, 1910 and thenceforth, without exception has asserted and exercised the power which it has asserted and exercised in this case.

Black Horse Tobacco Co. v. I. C. R. R. Co., 17 I. C. C. 588;

Larrowe Milling Co. v. W. & L. E. R. R., 52 I. C. C. 145;

Monarch Paper Co. v. C. P. Ry. Co., 53 I. C. C. 620;

International Nickel Co. v. Director General, 66 I. C. C. 627;

Rub-No-More Co. v. Director General, 69 I. C. C. 23.

Save the case at bar, we find no reported decision in which any Court has ever held that the Commission had exceeded its powers in so doing. Further, the Commission holds that under the decision of this Court in the *News Syndicate Co.* case, it has jurisdiction to award reparation in cases of the kind presented.

Atlantic Fish Co. v. C. N. R., 148 I. C. C. 533;

Charles B. Justice Co. v. Holton I. R. Co., 153 I. C. C. 673;

San Diego Oil Products Corp. v. Holton I. R. Co., 164 I. C. C. 505.

The decision here under review is predicated upon the conclusion of the Court below that the respondent had not violated the Interstate Commerce Act in any respect whatever. (R. 81.) The respondent has argued that your petitioner and all shippers are given an opportunity to secure a reasonable rate for transportation within the United States so long as the carriers maintain a reasonable rate from the international boundary line to the destination in the United States. In the *News Syndicate Co.* case this Court held that the carriers within the United States were bound to accord shippers that opportunity, but the Court did not say or infer that the obligations of the carriers within the United States ended there. It is here we believe that the Court below fell into its outstanding error in interpreting the decision in the *News Syndicate Co.* case as holding that the sum total of the obligations of the carriers in the United States is to maintain lawful rates to and from the international boundary line without regard to whether the rates actually charged are lawful. The Interstate Commerce Act goes further than merely to require that the carriers in the United States shall afford shippers an opportunity to secure lawful rates. The Act places the burden squarely upon the carriers themselves of seeing to it that in every case the charges actually collected are lawful, regardless of how many opportunities the shipper may have had to secure lawful rates. Para. 5, Sec. 1, requires not only that the carriers shall maintain reasonable charges for services "to be rendered" but also requires that charges shall be

reasonable for services "rendered." A carrier may comply with its obligation to maintain lawful rates for services "to be rendered" merely by according shippers an opportunity to secure lawful rates, but the carrier has not fulfilled its obligation to make a lawful charge for services "rendered" unless the charge actually made for that service is lawful.

THE DECISION OF THE COURT BELOW PREVENTS THE EXERCISE BY THE INTERSTATE COMMERCE COMMISSION OF ANY EFFECTIVE CONTROL OVER CHARGES MAINTAINED OR COLLECTED BY RAILROADS FOR THE TRANSPORTATION WITHIN THE UNITED STATES OF PROPERTY MOVING IN INTERNATIONAL COMMERCE.

The duties of a carrier subject to the Act are the same with regard to transportation within the United States of property originating in a foreign country and destined to a point in the United States as they are with regard to transportation within the United States of property originating in the United States and destined to a point in a foreign country, or with regard to transportation within the United States of property originating in the United States and moving through a foreign country to a destination in the United States. The scope of the Act is defined in Para. (1) and (2) of Sec. 1. Para. (1) and (7) of Sec. 6, requiring railroads to publish and file their rates, and to collect the rates so published and filed, are applicable only to the character of commerce defined in Para. (1) and (2) of Sec. 1. Similarly Para. (5) of Sec. 1, requiring that all charges made shall be just and

reasonable, is applicable only to the character of commerce defined in Para. (1) and (2) of Sec. 1. Likewise Sec. 2, prohibiting discrimination and Para. (1) of Sec. 3 prohibiting undue preference or prejudice, are applicable only to the character of commerce defined in Para. (1) and (2) of Sec. 1. If it be said then that the maintenance or collection by a railroad in the United States of an unreasonable joint through rate, which includes in it transportation within the United States of property originating in a foreign country and destined to a point in the United States, does not constitute a violation of Para. (5) of Sec. 1 of the Act, as is held by the Court below, then obviously the maintenance or collection of such a joint through rate which was discriminatory, or which resulted in undue preference or prejudice, could not constitute a violation of Sec. 2 or Para. (1) of Sec. 3. Likewise, if the collection of such an unreasonable joint through rate does not constitute a violation of Para. (5) of Sec. 1, then the collection of an international joint through rate which was more or less than that named in tariffs filed with the Commission, could not constitute a violation of Para. (7) of Sec. 6. Therefore, if the Court below was correct in its conclusion that the collection by the respondent of an unreasonable joint through international rate which included in it transportation within the United States of property destined to a point in the United States and originating in a foreign country, did not constitute a violation of the Act, because of the fact that the respondent maintained

a lawful rate applicable to shipments from the international boundary line to the destination in the United States, the results may be illustrated as follows: First, railroads in the United States may lawfully join with Canadian railroads in through rates from St. Louis to Montreal which are grossly prejudicial in comparison with rates from Chicago to Montreal. In such a situation, of what practical use would it be that the rates from Chicago and from St. Louis to the international boundary line might be entirely free from undue prejudice, if the rates actually charged were prejudicial? Second, railroads in the United States may lawfully join in through rates from Montreal to St. Louis on shipments consigned to X Co. with higher rates from Montreal to St. Louis on shipments consigned to Y Co. Of what use would it be that the rates from the international boundary line to St. Louis might be lawful in every respect if the rates actually charged to Y Co. were higher than the rates charged to X Co.? Third, the Commission may wish to fix minimum rates from Seattle, Wash., to Detroit, Mich., but will be unable to effectually exercise its powers in that direction because of the availability of routes from Seattle to Detroit which operate through Canada, inasmuch as joint through rates over such routes would be free from the requirements of the Act or the jurisdiction of the Commission. In such a case, of what practical use would it be that the rates from Seattle to the point where the shipments entered Canada and to Detroit from the point where

the shipments again entered the United States were entirely lawful if the carriers in the United States were nevertheless free to join in through rates from Seattle to Detroit, through Canada, which were free from the requirements of the Act? Fourth, railroads in the United States may join with carriers in foreign countries in secret joint through rates between points in foreign countries and points in the United States, inasmuch as these joint through rates would be free from the requirements of Para. 6 and 7 of Sec. 6 of the Act relative to publishing and filing rates with the Commission. Fifth, a railroad in the United States may lawfully join with carriers in Mexico in the establishment and filing with the Interstate Commerce Commission of a rate of $1.33 per 100 lbs. on cow peas from Navojoa to San Francisco, but on arrival in San Francisco the railroad may collect from the consignee either more or less than that amount, and the Interstate Commerce Commission would be powerless to do anything in the matter.

The foregoing illustrations were cited in brief in support of our petition herein. Brief of respondent in opposition to petition for writ of certiorari, at page 18, contends that "these illustrations all depend upon the erroneous view that the lower Court has held that an international through rate is wholly free from the restraints of Para. (5) of Sec. 1 of the Act; and the deduction, drawn from that assumption, that if that portion of the statute is not controlling, other sections are likewise without ap-

plication. The lower Court made no such decision." Since respondent says we were in error in these illustrations, we necessarily take it to be respondent's view that the maintenance or collection of a discriminatory joint through international rate would constitute a violation of Section 2 of the Act, notwithstanding the maintenance of a non-discriminatory rate between the international boundary line and the origin or destination point in the United States; that the maintenance or collection of a preferential or prejudicial joint through international rate would constitute a violation of Para. (1) of Sec. 3 of the Act, notwithstanding the maintenance of a rate, free from preference or prejudice, between the international boundary line and the origin or destination point in the United States; that the maintenance of a less than reasonable rate from a point in the United States through a foreign country to a destination in the United States would constitute a violation of Para. (5) of Sec. 1 of the Act, thus enabling the Commission to exercise its minimum rate powers, notwithstanding the maintenance of reasonable rates from the point of origin in the United States to the international boundary line and from the international boundary line to the destination in the United States. And yet the respondent argues, and construes the decision of the Court below as holding, that the maintenance and collection by the respondent of an unreasonably high joint through international rate was not a violation of Para. (5) of Sec. 1, because the respondent

maintained a reasonable rate from the international boundary line to the destination in the United States. This reasoning strikes us as enigmatic beyond comprehension.

The respondent says that the decision of the Court below should not be construed as holding that international joint through rates are entirely free from the restraints of Para. (5) of Sec. 1 of the Act. This paragraph does not require anything of any rates except that all charges made for any service rendered or to be rendered, within the scope of the Act, shall be just and reasonable. What restraints, then, does the respondent think are imposed upon joint through international rates by Para. (5) of Sec. 1, if the collection of an unreasonable joint through international rate does not constitute a violation of any provision of the Act, as is held by the Court below? If Para. (5) of Sec. 1 does not restrain the collection of an unreasonable joint through international rate, then what does it restrain with regard to such rates? The collection by a carrier in the United States of an unreasonable joint through international rate is either a violation of the Interstate Commerce Act or else those rates, when established, are entirely free from all of the provisions of the Interstate Commerce Act.

CONCLUSION.

Upon any one of the several grounds stated above, the decision of the Court below, predicated upon the

conclusion that the Act was not violated and therefore that the Interstate Commerce Commission was without jurisdiction, should be reversed.

Dated, San Francisco, California,
February 11, 1931.

Respectfully submitted,

ERNEST CLEWE,
Attorney for Petitioner.

E. W. HOLLINGSWORTH,
Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

this_____day of February, 1931.

_____

_____

_____

Attorneys for Respondent.

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

October Term, 1930.

No. 520.

LEWIS-SIMAS-JONES COMPANY,
Petitioner,

v.

SOUTHERN PACIFIC COMPANY,
Respondent.

REPLY BRIEF FOR PETITIONER.

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E. W. HOLLINGSWORTH,
Of Counsel.

PRESS OF THE SUDWARTH CO., WASHINGTON

TABLE OF CONTENTS

	Page
Summary of Contentions Made in Brief of Respondent to Which This Reply Brief Will Be Addressed	1
Respondent's Contentions Are Unsound and Are Unsupported by the Law and the Decisions	4
Conclusion	33

TABLE OF CASES

Armour Packing Co. v. United States, 153 Fed. 1; 209 U. S. 56	6
Baer Bros. Mercantile Co. v. D. & R. G., 233 U. S. 479	23
Baltimore & Ohio v. Settle, 260 U. S. 166	7
Boston & Maine R. Co. v. Hooker, 233 U. S. 97	6
Canales v. G. H. & S. A. Ry. Co., 37 I. C. C. 573	31
Cosmopolitan Shipping Co. v. Hamburg-American Packet Co., 13 I. C. C. 266	5
Cyanamid & Cyanide from Niagara Falls, 155 I. C. C. 488	20
Fernandez v. S. P. R. R. Co. of Mexico, 104 I. C. C. 193	31
Galveston, Harrisburg & San Antonio Ry. Co. v. Woodbury, 254 U. S. 357	14
Houston & Texas Ry. v. U. S. 234 U. S. 342	28
International Nickel Co. v. Dir. Gen., 66 I. C. C. 627	26
Interstate Commerce Commission v. B. & O., 225 U. S. 326	32
L. & N. R. R. Co. v. Maxwell, 237 U. S. 94	7
News Syndicate Co. v. N. Y. C., 275 U. S. 179	2
Seymour v. M. L. & T. R. & S. Co., 35 I. C. C. 492	31

TABLE OF CASES (Continued)

	Page
Spanish River Pulp & Paper Mills v. A. & W. Ry. Co., 113 I. C. C. 343	23
Texas & Pacific v. I. C. C., 162 U. S. 197	10, 13, 16, 21
United States v. Grand Trunk Ry. Co. of Canada, 225 Fed. 283	13
United States v. Gulf Refining Co., 268 U. S. 542	6
United States v. Pacific & A. R. & N. Co., 228 U. S. 87	21
United States v. Pa. R. R., 242 U. S. 208	25
U. S. Industrial Alcohol Co. v. Dir. Gen., 18 I. C. C. 389	6
Virginian Rwy. Co. v. U. S., 272 U. S. 658	23
Western Union Telegraph Co. v. Esteve Bros & Co., 256 U. S. 566	16

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SUMMARY OF CONTENTIONS MADE IN BRIEF OF RESPONDENT TO WHICH THIS REPLY BRIEF WILL BE ADDRESSED.

The main contentions made by respondent in its brief in respect to this case may be summarized as follows:

1. Respondent contends that the Interstate Commerce Commission was without jurisdiction to award damages in this instance because respondent maintained a rate from Nogales, Ariz., the border point, which would have been applicable to carload shipments of cow peas originating at that point or to shipments rebilled at that point, and that as the local rate was not alleged to be or found to be unreasonable there was no violation of the Interstate Commerce Act within the contemplation of the decision in *News Syndicate Co.* v. *N. Y. C.*, 275 U. S. 179, on which the Commission could base an order.

2. Respondent does not contend that the rate from border point was applicable to the shipments here involved which moved on through bills of lading executed by the Southern Pacific Railroad Company of Mexico at Navojoa, Mexico, for through carriage to San Francisco, Calif., through the port of Nogales, Ariz.; but respondent does contend that the shipper could have obtained the application of the local rate from the border point to San Francisco had he elected to bill the shipments from Navojoa, Mexico, to Nogales, Ariz., and there made arrangements to have them rebilled from that point to San Francisco.

3. Respondent contends that the court below was right in holding that as respondent maintained a rate as required by the Interstate Commerce Act on shipments billed or rebilled from Nogales, Ariz., to San Fran-

cisco, the petitioner was not compelled to pay the joint through rate of $1.33 found unreasonable by the Commission, and that the court below was right in holding that in the circumstances of this case there was no violation of the act upon which the Commission could predicate an award of damages.

4. Respondent contends that the joint through rate of $1.33 applicable to shipments made as these were on through bills of lading is not subject to the jurisdiction of the Commission but by the bill of lading contracts issued by the carrier at Navojoa, Mexico, the transportation, the joint rates are subject to the Mexican classifications and tariffs in force on the date of shipment, all of which were filed with the Department of Communications and Public Works of Mexico.

5. Respondent contends that it is inconsistent for the Commission to hold that it may determine the reasonableness of an international joint rate to ascertain damages, while at the same time holding that it has no power to require carriers subject to its jurisdiction to establish and maintain a joint international rate for the future.

6. Respondent contends that by the amendment to section 1 of the Interstate Commerce Act, effective February 1, 1920, which added the phrase "but only in so far as such transportation or transmission takes place within the United States" the jurisdiction of the Commission theretofore conferred

was narrowed, and respondent implies by this that, whereas the Commission had had jurisdiction over joint international rates prior to 1920 that jurisdiction was modified by the amendment made in 1920.

RESPONDENT'S CONTENTIONS ARE UNSOUND AND ARE UNSUPPORTED BY THE LAW AND THE DECISIONS.

Most of the contentions made by respondent on brief have been dealt with in a general way at least in the briefs of *amicus curiae* and of petitioner. However a more critical analysis of respondent's contentions as they are here summarized may be of some aid to the Court. The six summarized contentions will be dealt with together as there is more or less of a dovetail in the subject matter of each. We will undertake to show that the premise on which these contentions rest and the contentions themselves are unsound and are not supported by the decisions of the courts or of the Commission or by the law.

It was the duty of the respondent to maintain and apply a just and reasonable rate to the transportation service actually performed in respect to the shipments here involved, as they were made. The court below erred in finding that the respondent met its full duty under the act by maintaining a rate from the border point which would have been applicable to shipments originating at that point and to shipments rebilled from that

point to San Francisco but which was not applied and was not applicable to the shipments as made.

Under Section 1 (5) of the Interstate Commerce Act railroads, common carriers, must not only maintain just and reasonable charges for services rendered, but must apply just and reasonable charges to the service which they perform. And under Section 6 of the act, these charges must be published and kept open to public inspection and must show the places between which they apply.

The contention of respondent that the shipper had the choice of rates in respect to the shipments here involved and could have obtained the application of the local rate from Nogales, Ariz., to San Francisco had he elected to arrange to have the shipments rebilled at Nogales is unsound. In the first place, this contention begs the question. In the second place one of the great purposes of the Interstate Commerce Act and of the Elkins Act, 32 Stat. L. 847, 34 Stat. L. 584, was to cut out by the roots all forms of discrimination and to require common carriers to publish, maintain and apply specific and certain rates and charges to both interstate and foreign commerce. *Cosmopolitan Shipping Co.* v. *Hamburg-American Packet Co.*, 13 I. C. C. 266. The only commerce excluded from Section 1 is commerce moving wholly within a state.

It is settled law that there can be only one legal rate applicable to the movement of commerce sub-

ject to the act between given points. In *United States* v. *Gulf Refining Co.*, 268 U. S. 542, this Court cited with approval the finding made by the Commission in *U. S. Industrial Alcohol Co.* v. *Dir. Gen.*, 18 I. C. C. 389, 392, where the Commission said:

> "There could not have been at the same time rates legally applicable and other rates 'technically' legally applicable. There can be but one applicable rate at the same time over the same route between the same points on the same traffic."

In *Armour Packing Co.* v. *United States*, 209 U. S. 56, 81, this Court said that the law

> "has provided for the establishment of one rate, to be filed as provided, subject to change as provided, and that rate to be while in force, the only legal rate."

And, in the same case, this Court said:

> "It was the central and controlling purpose of the law to require all shippers to be treated alike, and but one rate to be charged for similar carriage of freight, and that the filed and published rate, equally known by and available to every shipper."

In *Boston & Maine R. Co.* v. *Hooker*, 233 U. S. 97, 110, this Court said it was

> "the purpose of the Act to have but one rate, open to all alike, and from which there could be no departure."

This language was again repeated by the Court in *L. & N. R. R. Co.* v. *Maxwell*, 237 U. S. 94, 97. To the same effect is *Baltimore & Ohio* v. *Settle*, 260 U. S. 166.

But the respondent contends that the doctrine of these cases is applicable only to domestic commerce between points within the United States. It is significant that the finding of this Court in the *Armour case*, 209 U. S. 56, is in respect to an indictment charging rebates on a shipment moving by rail from Kansas City to New York City for transshipment to Christiania, Norway, on a through bill of lading, and as to which the originating carrier agreed to carry to the destination in Norway for a through rate which included the carriage by and the rate of the steamship line. The bill of lading issued by the originating carrier was delivered to the Traders Dispatch, a fast freight line, which issued in lieu thereof a through bill of lading for the goods at a through rate to Christiania. The rate agreed to between Armour and the originating carrier, the Chicago, Burlington & Quincy, was 12 cents per 100 pounds less than the rate that would have been made by adding to the steamer charge the published proportional rate to New York filed with the Commission. In that case counsel for Armour urged that since the transportation was on a through

bill of lading to a foreign country under a through contractual arrangement, it was not subject to the act to regulate commerce, that the rates applicable thereto were not required to be published and filed with the Commission, and that there was no prohibition against rebating in respect to such rates. As to that contention the Circuit Court of Appeals for the Eighth Circuit, speaking through Sanborn, C. J., said at page 10 of 153 Fed. 1:

> "It is contended that, although the act may apply to the carriage of property in foreign commerce when consigned from a place in the United States to the port of transshipment for export, to be there again consigned to its destination in the foreign country, yet it has no application to the transportation of such property under a through bill of lading from the place of the origin of the carriage to the foreign destination. The proposition cannot be sustained. The act is general, comprehensive, includes within its express terms all transportation of property in foreign commerce from the place of origin in the United States to the port of transshipment, and it contains no exception of such carriage under through bills of lading."

And at page 12 said:

> "If those rates are separate from the ocean rates they may undoubtedly be separately filed and published, and the ocean rates may be added to make aggregate through rates,

as was done in the case under consideration. If by agreement or arrangement between the inland and the ocean carriers or by common control the inland rates become parts *of joint through rates*, then the *latter rates become the rates of transportation* to or from the ports of transshipment from or to the places of the origin or destination of the traffic in the United States, and they thereby fall within the terms and reason of the law."

When the case reached this Court, Mr. Justice Day, dealing with the same question, said:

"It is further contended by petitioners that the statutes have no application to a shipment on a through bill of lading from an interior point in the United States to a foreign port. It is alleged that the Elkins law refers to the original interstate commerce act, and that its terms do not include such shipments. Analyzing the first section of the Act (24 Stat. L. at 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), it is said that it applies to the following kinds of commerce: (a) Interstate Commerce; (b) commerce between the United States and an adjacent foreign country; (c) commerce between places in the United States passing through a foreign country; (d) commerce from the United States to a foreign country, only while being transported to a point of transshipment; (e) commerce from a foreign country to points in the United States, but only while being carried from port of entry either in the United States or an adjacent foreign

country. And it is contended that sec. 6, as amended (25 Stat. at l. 855, chap. 382, U. S. Comp. Stat. 1901, p. 3158), does not require the filing of through export tariffs.

The purpose of Congress to embrace the whole field of interstate commerce is made apparent by the exclusion only of *wholly domestic commerce* in the last clause of section 1 of the original act of 1887, and in the declaration of the scope and purpose of the act, declared in its title. *Texas & P. R. Co.* v. *I. C. C.*, 162 U. S. 197, 211, 40 L. Ed. 940, 944, 5 I. C. Rep. 405, 16 Sup. Ct. Rep. 666. There is no attempt in the language of the Act to exempt such foreign commerce as is carried on a through bill of lading; on the contrary, the act in terms applies to the transportation of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment.

What reasonable ground is there for supposing that Congress intended to exercise no control over such commerce if it happens to be billed through to the foreign port? *Such construction would place such important commerce shipped in the United States to a port for transshipment abroad wholly outside the restrictions of the law, and enable shippers to withdraw such commerce from the regulations enforced against other interstate commerce by the expedient of a through bill of lading.*" (Italics ours).

The construction of the act urged by the respondent and sustained by the lower court places the character of commerce and the rates here involved outside of the prohibitions and the duties imposed by the act and leaves the carrier free to indulge in the very practices as to this commerce the act to regulate commerce was designed to prevent.

The shipper's right to enjoy reasonable rates under the Interstate Commerce Act is not contractual because the amount to be paid for transportation as a matter of contract is fixed by the tariffs of the carriers on file with the Interstate Commerce Commission. And no matter how excessive the rate published may be, the shipper is obliged under the law to pay it. The doctrine of the cases here cited that there can be but one lawful rate, is as applicable to shipments moving from a foreign country on a through bill of lading as it is to shipments moved in interstate commerce between points within the United States.

As to the proposition that there can be but one lawful rate applicable to commerce subject to the act, respondent contends that neither the rule in the *Settle case* nor any other rule of interpretation of the act by the courts or the Commission can be extended beyond the boundary line into the territory of an adjacent foreign country so as to control the transportation service there performed "compelling shippers there to use, and foreign carriers to observe, a joint through rate as the only rate applicable" and that "no provision of the

act can be invoked to forbid a shipper from billing a shipment, intended to move to a United States destination, at the local rate to the boundary line, and thence rebilling at the domestic rate." The Commission did not exercise extraterritorial powers in finding the rate here in issue unreasonable and in awarding damages. While it may be conceded that the Commission has not the power to control the manner in which shippers and carriers in a foreign country may elect to route or bill shipments from a foreign country to a point in the United States, neither does there appear to be anything in the Interstate Commerce Act by which a shipper in a foreign country may be compelled to bill a shipment to a border point and designate an agent at that point to rebill the shipment to a point in the United States. But this is not to say that the Interstate Commerce Act does not provide that there shall be but one lawful rate applicable to particular commerce according to the service rendered by the carrier subject to the act with respect to that commerce. It is not open to a carrier either under the Interstate Commerce Act or the Elkins Act to maintain two or more rates applicable to the same transportation service whether it be in respect to interstate or foreign commerce. Under these acts there can be but one lawful rate applicable to the transportation of property in respect to the service performed in the carriage of such property.

In *United States* v. *Grand Trunk Ry. Co. of Canada*, 225 Fed. 283, the defendant was indicted under the Elkins Act for rebating in respect of passenger fares charged a theatrical troup for a trip from a point in the United States through Canada to another point in the United States. Defendant urged that this did not constitute a violation of the act because a part of the trip was through Canada, and alleged that to be valid the indictment should state that the payment of rebates was on the American portions of the journey. As to that contention the Court said:

> "The question thus presented is perhaps not wholly free from difficulty, but it must be considered in connection with the intention of Congress to make provision for the transportation of commerce, not only between states and territories, but to and from foreign countries, and broadly for 'the whole field of commerce,' excluding intrastate. *Texas & P. R. R. Co.* v. *I. C. C.*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. ed. 940. The indictment is not open to the inference that the transportation in question was for separate completed journeys in Canada. The offense consisted of a plan to divert passenger traffic to the lines of the defendant company which extended from points in the United States through Canada to other points in the United States. The question, however, of the payment of rebates or refunds on fares betwen points in Canada exclusively arises only as an incident of the entire transportation which originated in the

United States, for the indictment as I read it, substantially charges that the rebates were to be paid from the aggregate fares for the entire journey under an agreement devised to evade the statute. The route from Detroit to Boston was evidently regarded by the parties to the agreement as a theatrical circuit for shows of the Empire Circuit Company, and, although stops were made along the way for the giving of performances, the idea no doubt was that the journey was to be practically continuable."

The Court sustained the indictment and it should be kept in mind in considering this case that the rebate dealt with was from the *aggregate fares for the entire journey* from a point in this country through Canada to another point in this country.

Galveston, Harrisburg & San Antonio Ry. Co. v. *Woodbury*, 254 U. S. 357, decided December 13, 1920, dealt with a suit for damages. Mrs. Woodbury traveled from a point in Ontario, Canada, to El Paso, Texas, and returned on a joint through ticket with stop-overs permitted at various points. At some point en route between San Antonio and El Paso the railroad lost her trunk. She sued for the value of the trunk and contents, which the jury found to be $500. The carrier insisted that it was not liable for more than $100 since it had filed with the Interstate Commerce Commission a tariff limiting its liability to that amount. The question presented was whether the transporta-

tion of the lost property was subject to the Act to Regulate Commerce, although begun in a foreign country.

At page 359 of the decision Mr. Justice Brandeis said:

"But counsel for Mrs. Woodbury insists that solely because her journey originated in Canada, the provisions of the Act to Regulate Commerce do not apply. The contention is that Section 1 of the Act of 1887 does not apply to the transportation of passengers from a foreign country to a point in the United States. To this there are two answers. The first is that the transportation here in question is not that of a passenger, but of property. *Boston & M. R. Co.* v. *Hooker*, *supra*. The second is that the act does apply to the transportation of both passengers and property from an *adjacent* foreign country, such as Canada. Section 1 declares that the act applies 'to any common carrier * * * engaged in the transportation of passengers or property * * * from any place in the United States to an adjacent foreign country.' A carrier engaged in transportation by rail to an adjacent foreign country is, at least ordinarily, engaged in transportation also from that country to the United States. The test of the application of the act is not the direction of the movement, but the nature of the transportation as determined by the field of the carrier's operation. This is the construction placed upon the act by the Interstate Commerce Commission. *International Paper Co.*

v. *Delaware & H. Co.*, 33 Int. Com. Rep. 270, 273, citing *Texas & P. R. Co. v. I. C. C.*, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666."

This Court sustained the limitation of liability published in the tariffs of the carrier under the joint rate, and reversed the judgment of the lower court, despite the fact that the contract was made in a foreign country and that the Carmack amendment fixes the liability upon the initial carrier for the loss and damage sustained. It is interesting to observe that in the Woodbury case it was the carrier, which is a part of the Southern Pacific Company, respondent in this case, which contended that the status of the parties was fixed and determined by the joint rate applicable from Canada to the United States.

In *Western Union Telegraph Co.* v. *Esteve Brothers & Co.*, 256 U. S. 566, suit was brought to recover damages from the telegraph company resulting from the erroneous transmission of an unrepeated cablegram from Barcelona, Spain, to New Orleans. The message traveled over the lines of the Spanish government telegraph from Barcelona to Paris, and thence over the lines of the French government to Havre, thence via the Western Union cable lines to New York and over its land lines to New Orleans. The Western Union rate from Havre to New Orleans was carried in its tariffs on file with the Commission, which limited its liability in respect to unrepeated messages

to the charge made for tolls. The question presented was whether the sender without assent in fact to the limitation of liability, was, as a matter of law, bound thereby because that limitation was a part of the lawfully established rate. After noting that the Act to Regulate Commerce included telegraph and cable companies engaged in sending messages between the United States and foreign countries, Mr. Justice Brandeis, at page 572 of the decision, said:

> "And whatever may have been the legal incidents of transmitting the message from Barcelona to Havre under Spanish and French law, the Western Union, in sending the message over its own lines from Havre to New Orleans, was governed by the provisions of that act."

These decisions dispose of the contention made by respondent here, first, that a joint international rate is not subject to the Interstate Commerce Act and to the jurisdiction of the Commission; and, second, that the rights of petitioner and the shipper in Navojoa, Mexico, are governed entirely by the bill of lading contract, the laws and the tariff classifications of Mexico made a part of that contract. In so far as the bill of lading contracts contain rates or other conditions which are contrary to the duties imposed upon the railroads in this country under the Interstate Commerce Act, they are void as contrary to public policy. 10 Corpus Juris 510.

We have shown that the first four contentions in the summary of contentions made by respondent on brief are unsound in practically every respect. Respondent cannot consistently contend that the *Armour Packing Company case, supra,* does not support the point made by us which is that a joint international rate is subject to the jurisdiction of the Commission because on page 26 of its brief it states that there should be no distinction "as between shipments moving by rail and water from interior points in non-adjacent foreign countries to points in the interior of the United States." At page 26 of its brief respondent also argues that if the Commission has the power to exercise the jurisdiction asserted here it "would be required to extend its investigation far beyond the territorial limits of the United States, and to invade the sovereignty of friendly foreign nations, in order to be properly informed." This argument is answered by the decision of this Court in the *News Syndicate case,* which holds unequivocally that where a railroad does not maintain a just and reasonable rate applicable to the transportation service from the border, the Commission may inquire into the reasonableness of the entire joint rate and thereby inform itself in respect to conditions in a foreign country. If the Commission has the power for one purpose it must have it for another. In these circumstances there is no point to this argument.

The decisions cited show that the court below erred in holding that as the respondent maintained a rate on carloads of cow peas billed or rebilled from the border point to San Francisco the petitioner was not compelled to pay the joint through rate of $1.33 per 100 pounds found unreasonable by the Commission and on that account there was no violation of the act upon which the Commission could predicate an award of damages. In this conclusion the court below erred in two important particulars: First, it erred in holding that the petitioner was not compelled to pay the joint through rate found unreasonable by the Commission; and, second, it erred in holding that the local rate applicable from Nogales, Arizona, the border point, to San Francisco on shipments billed or rebilled from that point was applicable to the shipments of petitioner as actually made. These findings by the court below are in direct contradiction to the contentions of respondent. Respondent concedes and contends that the shipper, having elected to make the shipments on through bills of lading from Navojoa, Mexico, to San Francisco, is bound by the terms of those bills of lading, the rates named therein, and the Mexican law and tariffs applicable thereto, and that for these reasons the local rate from Nogales, Ariz., to San Francisco was not applicable to the shipments as made. The respondent's contention is that the local rate from Nogales would have been applicable had the shipper elected to bill the shipments

from Navojoa, Mexico, to Nogales, Ariz., and there arrange to have them rebilled from Nogales to San Francisco. The court erred also in failing to find that the respondent did not maintain and did not apply any rate applicable from the border to the shipments and the kind of transportation service actually performed by the respondent. The failure of the respondent to maintain and to apply just and reasonable rates from the border to the transportation service actually performed in respect to these shipments is a violation of section 1 of the Interstate Commerce Act. The Commission's order is predicated on such a violation. It is true that the Commission found the entire rate to be unreasonable, but that was also true in the *News Syndicate case*.

In addition, the duty of railroads to publish rates to and from the boundary line is not exclusive and all embracing. They have the alternative in respect of their participation in joint international rates. In other words, as the Commission held in *Cyanamid & Cyanide from Niagara Falls*, 155 I. C. C. 488, the fact that the carriers had committed a tort in failing to make or publish any rate applicable to that part of the transportation within the United States "is not conclusive that they could commit no tort in respect of a joint international rate" is sound doctrine. And the Commission has the power to determine whether a particular joint rate participated in by a carrier subject to its jurisdiction was unjust and unreasonable. This view is sus-

tained by the decisions of the Commission itself and by the decisions of this Court already cited.

United States v. *Pacific & A. R. & N. Co.*, 228 U. S. 87, cited in our brief, and *Texas & Pacific* v. *I. C. C.*, 162 U. S. 197, are we think authority for the proposition that the Commission has the power to reach a carrier subject to its jurisdiction and to consider the entire rate where the allegation is that the carrier has exacted unreasonable charges by means of a joint rate or otherwise in respect of commerce moving from a foreign country to a point in the United States.

In *Texas & Pacific* v. *I. C. C.*, *supra*, frequently called the *Import case*, this Court reversed an order of the Commission which was based in part on the view taken by the Commission that, in determining whether the prohibitions in the act against unjust discrimination and undue prejudice were violated in respect of commerce from foreign countries moving under joint rates, the Commission could not consider conditions beyond the seaboard of the United States. As to that the Court said:

> "In determining questions of the reasonableness of rates, and of discrimination, in respect to traffic originating in foreign countries, the Commission and the courts may and should take into consideration, as constituting dissimilar conditions, circumstances existing beyond the seaboard of the United States (such as competition by ocean freights), as well as conditions prevailing within the United States."

One of the contentions in that case was that the place at which joint rates should be published for the information of shippers would be at the place of the origin of the imported freight, and that this cannot be done or be compelled to be done by the Commission in foreign ports. After reciting this contention the Court said:

> "The force of this contention is not perceived. Room is left for the application of these provisions to traffic originating within the limits of the United States, even if, for any reason, they are not practically applicable to traffic originating elsewhere. Nor does it appear that the commission may not compel all common carriers within the *reach* of their jurisdiction to publish such rates, and to furnish the commission with all statements or reports prescribed by the statute. Nor was there any allegation, evidence, or finding in the present case that the Texas & Pacific Railway Company has failed to file with the commission copies of its joint tariffs, showing the joint rates from English ports to San Francisco, nor that the company has failed to make public such joint rates in such manner as the commission may have directed."

The respondent also contends that the action of the Commission in the instant and similar cases in exercising jurisdiction to determine that a joint international rate is unreasonable and to award damages, if found unreasonable, is inconsistent

with decisions in which it holds that it has not the power to require carriers to establish and maintain joint international rates for the future. Even if as to this general question the Commission has been inconsistent as claimed by respondent, that fact would be wholly unimportant in considering the validity of the order here under review. *Virginian Railway Co.* v. *U. S.*, 272 U. S. 658. But there is no necessary connection between the quasi judicial function of determining that a rate charged was unreasonable to ascertain the damage and the exercise of the quasi legislative function of fixing a reasonable rate for future application. *Baer Bros. Mercantile Co.* v. *D. & R. G.*, 233 U. S. 479. Moreover it is one thing for the Commission to require a carrier subject to its jurisdiction to join a carrier in a foreign country to establish a joint rate, and it is quite another thing for the Commission to determine whether a joint rate voluntarily established by a carrier subject to its jurisdiction is in violation of the Interstate Commerce Act.

However, the Commission has exercised the power to find that joint international rates applicable to commerce from Canada to destinations within the United States will be unreasonable for the future to the extent that such rates exceeded reasonable rates and has required the railroads subject to its jurisdiction to cease and desist from participating in the rates found unreasonable. *Spanish River Pulp & Paper Mills* v. *A. & W. Ry. Co.*, 113 I. C. C. 343, and 120 I. C. C. 251. In the

latter case where the power of the Commission was challenged to require the defendants to cease and desist from participating in unreasonable rates for the future, the Commission said:

> "If we may require American lines to pay reparation under internatioinal joint rates, how much more rational is the assumption that we may require them to refrain from participating in and applying rates which will render them subject to such judgments."

But respondent contends that the amendment to section 1 of the Interstate Commerce Act made February 1, 1920, which added the phrase "but only in so far as such transportation or transmission takes place within the United States" narrowed the jurisdiction the Commission theretofore had in respect to foreign commerce. On this premise respondent contends that the Commission now has no jurisdiction to determine the reasonableness or lawfulness of a joint international rate exacted by a carrier subject to its jurisdiction in respect to international commerce except where the carrier fails to maintain a rate from the border. We have not been able to find anything in the reports of the committees of Congress which considered the Transportation Act and the amendments to the Interstate Commerce Act made in 1920 which throws light on the reasons for the 1920 amendment. It does appear, however, that the use of the phrase "adjacent foreign country"

in the act as it read prior to the amendments in 1920 had caused some confusion, and that the main change in section 1 in respect to the transportation of passengers and property to and from a foreign country was the elimination of the word "adjacent." Section 1 (c) here pertinent, now reads that the act applies to the transportation of passengers and property "to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States." Under the language of the former act, there was room for doubt as to whether it applied to transportation from an adjacent foreign country to a point in the United States until the decision of this Court in the *Woodbury case*, 254 U. S. 357. At all events, in view of the enlarged powers conferred upon the Commission by the amendments to the act made in 1920, it is almost paradoxical to say that the inclusion in section 1 of the phrase "but only in so far as such transportation or transmission takes place within the United States" may be construed as restricting the powers theretofore possessed by the Commission over the rates, rules, regulations and practices of common carriers subject to the act in respect to foreign commerce.

The inclusion of these words in section 1, when considered in connection with the entire act and the general purposes thereof, are but the "expression of a necessary implication" to paraphrase the language used by this Court in *United States* v. *Pennsylvania R. R.*, 242 U. S. 208, in respect to

a point similar in principle. In that case the Pennsylvania Railroad filed a suit to enjoin an order of the Commission which required it, in effect, to supply tank cars or else be chargeable with unjust discrimination. One of the points relied upon in that case by the government was that the amendment to the Act to Regulate Commerce of 1906 which added to section 1 "and it shall be the duty of every carrier to provide and furnish such transportation upon reasonable request therefor," gave the Commission additional power over facilities and instrumentalities. As to that contention this Court said:

> "This, however, is but the expression of a necessary implication. It was useless to declare that whatever a carrier must do he must do upon reasonable request."

Likewise, it is reasonable to argue here that as neither Congress nor the Commission has extra-territorial jurisdiction, the addition of the phrase "but only in so far as such transportation or transmission takes place in the United States" in the amendment of 1920 is but the expression by Congress of a necessary implication in the more general language of the act as it stood prior to 1920.

In *International Nickel Co.* v. *Dir. Gen.*, 66 I. C. C. 627, the Commission itself dealt with a similar contention in the following manner:

"It is said that the amendments made by the transportation act, 1920, in section 1 of the Act to Regulate Commerce, as amended, have changed or restricted the jurisdiction which was theretofore vested in us by that section. These amendments carry our territorial jurisdiction up to the international boundary line, at which that of Congress itself halts. *Our territorial jurisdiction as to foreign commerce is thus co-extensive with that of the federal government.* No act of Congress has force of law beyond that boundary line, but up to it, as everywhere else within the United States, the Interstate Commerce Act has full effect, just as the Federal Control Act had effect when these shipments moved."

A reading of the entire act including section 1, indicates a clear purpose on the part of Congress to give to the Commission the extent of its power to regulate transportation between the United States and adjacent foreign countries. The power of Congress over the subject matter here in controversy is not only not questioned but is conceded. Respondent concedes that Congress could prescribe the terms and conditions under which railroads in this country might participate in joint rates. But it contends that Congress has not delegated such power to the Commission. Such a view requires a very narrow construction of the Interstate Commerce Act, and is inconsistent with the repeated expressions of this Court as to the extent of the power of the Commission in re-

spect to rates, regulations, rules and practices both under the Interstate Commerce Act and the Elkins Act. In the famous *Shreveport case*, *Houston & Texas Ry.* v. *United States*, 234 U. S. 342, it was contended that while Congress had the power to regulate rates on intrastate commerce so as to prevent unjust discrimination against interstate commerce that power had not been delegated to the Commission. As to this the Court said, at page 356, after referring to the language of the act:

> "This language is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn."

There is no basis for the view that Congress has withheld from the Commission any power to correct any wrongs forbidden by the Interstate Commerce Act or the Elkins Act committed by a railroad subject to its jurisdiction in respect to commerce moving from an adjacent foreign country in respect to foreign commerce in so far as that commerce is within the jurisdiction of Congress. Such a view is inconsistent with the language of the act and with its general purposes.

As already observed, the respondent contends that in view of the 1920 amendment to section 1 of the Interstate Commerce Act, referred to, the Commission has no jurisdiction over the commerce of the railroads otherwise subject to the act

as to charges exacted on commerce moving from a foreign country on a joint rate to a destination within the United States. If respondent is right in this contention, it means that by the simple participation in a joint rate on international commerce both the commerce and the railroad become immune from the regulatory powers of the Commission as to such rates. If Congress intended to bring about such an extraordinary situation it is reasonable to assume that it would have expressed itself in plain terms.

As to this respondent says that the court below declared that the international through rate is outside the jurisdiction of the act only when it affirmatively appears that the carrier within the United States has met its duty by maintaining a reasonable rate from the border, and that such a situation results from a defect in the statute itself. Respondent also states that unjust discrimination, rebating and the maintenance of more than one legal rate may be avoided where the carriers publish and maintain rates for transportation service within the United States and hold out "to interested shippers an opportunity to have such rates and charges applied." The respondent also goes so far as to suggest that where a carrier maintains a rate from the border no harmful results can follow if the carrier at the same time and "as a matter of convenience" maintains and applies a joint rate from the point in the foreign country to the destination in the United States. This is merely an argument *in extremis*,

and does not meet the point made by us, which is that so long as a joint rate is actually charged, the shipper who pays it has a right under sections 8, 13 and 16 of the Interstate Commerce Act to complain against the reasonableness of that charge and to recover damages if the acts of the carrier in respect to the charge are found to be in violation of the law.

In respect to the narrow construction that the respondent here urges be given the words "but only in so far as such transportation or transmission takes place within the United States," it is not without significance that in the *Woodbury* case, 254 U. S. 357, the Court rejected the contention that the Interstate Commerce Act as it read prior to 1920 did not apply to the transportation of passengers and property *from* an adjacent foreign country, like Canada, but only applied to passengers and property *to* an adjacent foreign country, and held that despite the restricted language in section 1 at that time that

> "a carrier engaged in transportation by rail to an adjacent foreign country is, at least ordinarily, engaged in transportation also from that country to the United States," and that the "test of the application of the act is not the direction of the movement, but the nature of the transportation as determined by the field of the carrier's operation. This is the construction placed upon the act by the Interstate Commerce Commission. *International Paper Co.* v. *Delaware & H. Co.*, 33 Int. Com. Rep. 270, 273, citing *Texas*

& P. R. Co. v. *I. C. C.*, 162 U. S. 197, 40 L. ed. 940, 5 Int. Com. Rep. 405, 16 Sup. Ct. Rep. 666."

In support of its contention that by the Interstate Commerce Act Congress has not given the Commission the full extent of its power to regulate international commerce, respondent refers to the decisions of the Commission in *Seymour* v. *M. L. & T. R. & S. Co.*, (1915) 35 I. C. C. 492; *Canales* v. *G. H. & S. A. Ry. Co.*, (1916) 37 I. C. C. 573; and *Fernandez v. S. P. R. R. Co. of Mexico*, (1925) 104 I. C. C. 193, in which the Commission held that it did not have jurisdiction as to rates on traffic moving from a foreign country through the United States *in bond* to a foreign country. In the *Woodbury case* the lower court held that as Mrs. Woodbury traveled from Canada on a ticket contract calling for transportation from a point in Canada and through the United States back to Canada, the contract was governed by Canadian laws, which in the absence of a showing to the contrary would be presumed to be the same as Texas laws. It cited certain of the above cases to support that finding. But this Court held that the cases cited which hold that transportation of property from a foreign country through the United States *in bond* to a foreign country is not subject to the act were not in point and that the transportation of the baggage lost between points in Texas on a contract made in

Canada which contemplated the transportation of the baggage as a part of the contract from that point to a point in the United States and back to Canada *not in bond* was subject to the act.

Apparently this Court has not been called upon to decide whether commerce moving from a foreign country through the United States in bond to a foreign country is subject to the Interstate Commerce Act. At all events the cases relied upon by respondent do not impair the contention made by us that Congress has delegated to the Commission the full extent of its power to regulate the rates and charges of carriers subject to the act in respect of transportation of foreign commerce subject to the act.

At the risk of repetition we again submit that the amendment to section 1 of 1920 here referred to did not restrict the power the Commission theretofore had over rates and charges, whether joint or otherwise, as to international commerce, and that that amendment is but the expression of a necessary implication which would have to be read in construing the extent of the power of Congress and the Commission whether or not the words of the amendment were actually stated in the act.

CONCLUSION.

The decision of the court below is based on an erroneous construction of the decision of this Court in the *News Syndicate case*. In addition, the court below held that the rate maintained from Nogales, Ariz., to San Francisco, applicable to shipments of cow peas billed or rebilled from that point was applicable to the shipments here involved which moved on through bills of lading and under through arrangements from Navojoa, Mexico, to San Francisco, and which were not billed or rebilled from Nogales, Ariz. This finding by the court is, as stated, in direct conflict with the position taken by the respondent on brief and in its answer which is that it applied the correct rate to the through shipment as made and that the local rate from the border was not applicable to these shipments but would have been applicable to different shipments differently handled to and from the border point. The respondent takes the high ground that the joint rate actually applied is governed by bill of lading contract, Mexican tariffs and the Mexican law, and that it is not subject to the jurisdiction of the Commission. This Court did not hold in the *News Syndicate case* that the mere maintenance of a rate by a carrier from the border point which is not used relieves the carrier of the duty of actually charging just and reasonable rates on foreign commerce. As pointed out in our brief, in holding in the *News Syndicate case* that the Interstate Commerce Act

applied to the lines that carried and to the transportation of the paper from the international boundary to New York City, the Court said:

> "It was the duty of defendants in error to establish just and reasonable rates *for that service.*"

and that

> "They failed to make or publish any rate *applicable* to *that* part of the transportation."

It is clear that in the *News Syndicate case* the Court held that a carrier could meet its duty under the act only in the event it maintained and *applied* a just and reasonable rate from the border point to the character of transportation service actually performed by it, and that the carrier does not meets its duty under the act by the mere expedient of maintaining a rate from the border point as a paper rate which it does not apply.

Where the published joint rate of a carrier, subject to the act, has been applied as the basis of exacting charges on through shipments from a foreign country, the carrier cannot claim that this rate is beyond the jurisdiction of the Interstate Commerce Act merely because the carrier maintains a local rate from a border point which it did not use but which might be used as to shipments billed or rebilled from that point. In such circumstances the carrier is in the same position

as were the defendants in the *News Syndicate case*, in that they failed to make or publish any rate *applicable* to *that part* of the transportation service from the border point.

Finally, if the finding of the court below that the rate maintained by respondent from the international boundary to San Francisco could have been applied to the shipments as made and was lawfully applicable, the judgment of that court should nevertheless be reversed because if the rate from the boundary was reasonable and lawfully applicable, the respondent violated the act in failing to apply that rate to these shipments. It is as much a violation of the Interstate Commerce Act for a carrier to fail to observe and apply the legal rate applicable to particular commerce as it is for a carrier to fail to publish and maintain a lawful rate between particular places.

Respectfully submitted,

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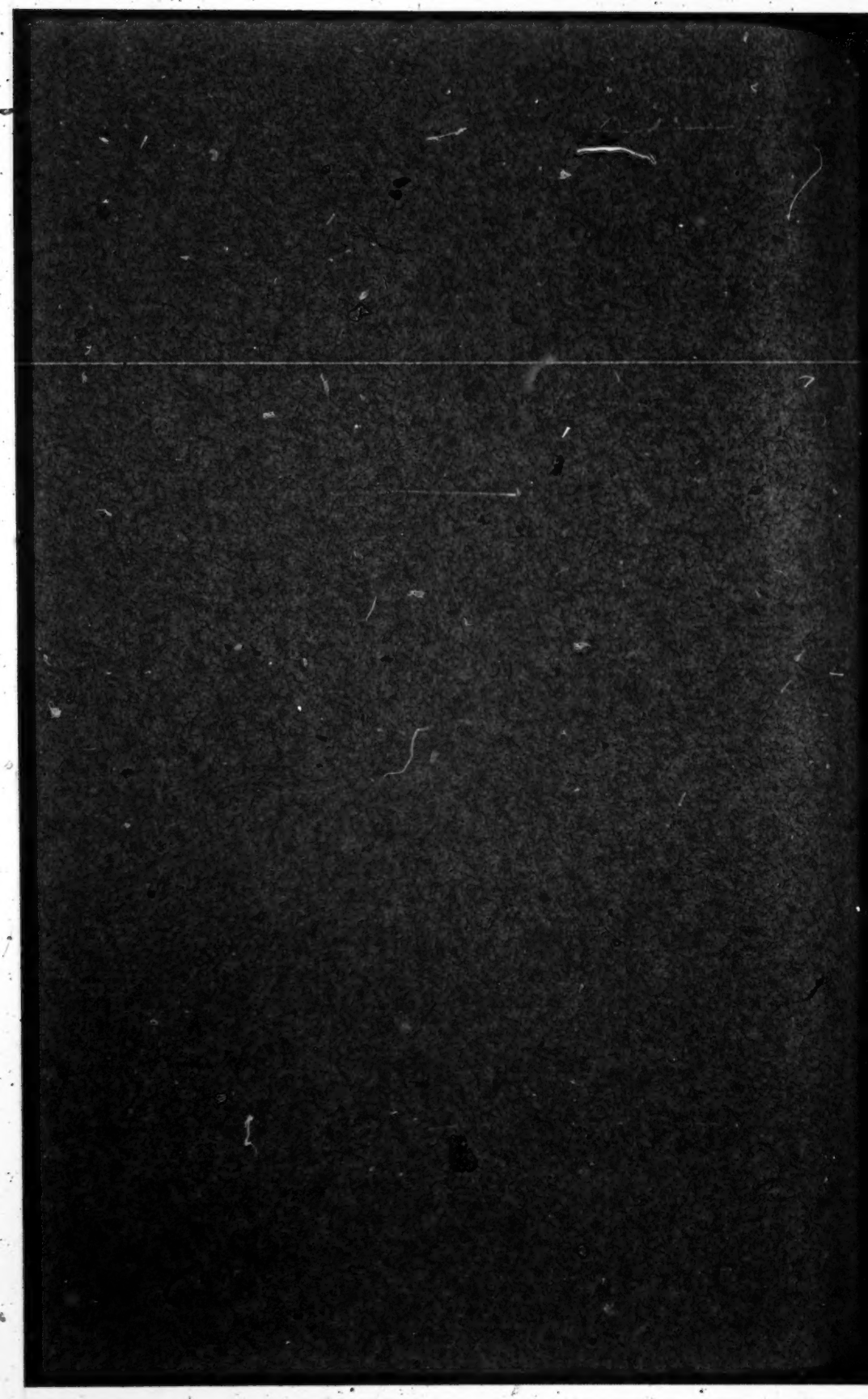
April 22, 1931.



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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1930

No. 520

LEWIS-SIMAS-JONES COMPANY,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,
Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari.

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Index

	Page
PRELIMINARY STATEMENT	1
ARGUMENT	3
1. The Federal question involved in this proceeding has been determined by this court adversely to petitioner (*News Syndicate Co. v. N. Y. C. R. R. Co.*, 275 U. S. 179). The decision of the State Court is squarely in accord with the decision of this court	3
2. The respondent fulfilled its duty under the Interstate Commerce Act, as interpreted in the *News Syndicate Case*, in that it maintained a reasonable rate applicable to that part of the transportation of complainant's shipments which took place within the United States	9
3. Respondent, having fulfilled its duty, under the Act, to maintain a reasonable rate applicable to the transportation service performed within the United States, committed no violation of the Act in collecting charges based upon the international through rate	16
CONCLUSION	20

Table of Cases Cited

	Pages
Armour Packing Co. v. U. S. (1908), 209 U. S. 56, 81; 52 L. ed. 687	13
B. & O. S. W. R. R. Co. v. Settle (1922), 260 U. S. 166; 67 L. ed. 189	9
Boston & Maine R. R. Co. v. Hooker (1913), 233 U. S. 97, 110; 58 L. ed. 868	13
International Nickel Co. v. Director General, 66 I. C. C. 627	13
L. & N. R. R. Co. v. Maxwell (1915), 237 U. S. 94, 97; 59 L. ed. 853	13
News Syndicate Co. v. N. Y. C. R. R. Co., et al. (1927), 275 U. S. 179; 72 L. ed. 225	4, 6
U. S. v. Mo. Pac. R. Co. (1929), 278 U. S. 269; 73 L. ed. 322	13

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PRELIMINARY STATEMENT.

The petitioner seeks to have this court review the decision of the District Court of Appeal of California, First Appellate District, Division 2, in *Lewis-Simas-Jones Company v. Southern Pacific Company* (June 16, 1930), 289 Pac. 643. That decision was affirmed by the California Supreme Court, through refusal to grant the plaintiff and appellant (petitioner here) a

hearing of the cause, after rehearing had been denied by the District Court of Appeal.

The decision of the District Court affirmed a judgment rendered by the Superior Court of California in a suit brought by petitioner, as plaintiff, to enforce payment of an award of reparation made by the Interstate Commerce Commission in *Lewis-Simas-Jones Co. v. Southern Pacific Co.* (1925), 102 I. C. C. 45. The Commission undertook to order respondent to pay reparation for the assessment of asserted unreasonable charges upon three carload shipments of cow peas which moved during November, 1923, from Navojoa, Sonora, Mexico, over the lines of the Southern Pacific Railroad Company of Mexico to the international boundary line at Nogales, Arizona, and thence over the lines of the respondent to San Francisco, California. An international through joint rate of $1.33 per 100 pounds was applied. The Commission, although stating in its opinion that it possessed no jurisdiction to prescribe a reasonable international rate for the future, undertook to determine that the rate charged had been unreasonable in the past, to the extent it exceeded 94 cents, and to order respondent to pay to the petitioner the difference between the charges collected, and those which would have accrued under the rate last named.

The respondent contended at the trial that the Commission's order was void for lack of jurisdiction. It proved that at all times during which the shipments moved it had maintained a rate applicable to that

part of the transportation of the petitioner's shipments which took place within the United States (i. e., from the international boundary line at Nogales, Ariz., to San Francisco), which was neither alleged, nor proved, nor found, in the proceeding before the Commission, to have been unreasonable, and which was in fact at all such times reasonable and lawful. The trial court sustained respondent's contention, made appropriate findings, and entered judgment in its favor as heretofore stated.

ARGUMENT.

1. The Federal question involved in this proceeding has recently been determined by this court adversely to petitioner (News Syndicate Co. v. N. Y. C. R. R. Co., 275 U. S. 179). The decision of the State Court is squarely in accord with the decision of this court.

Paragraph 5(a) of Rule 37 of the Revised Rules of this court, as far as material here, provides:

> "5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

The federal question of substance involved in this proceeding is whether the Interstate Commerce Commission possesses jurisdiction to inquire into and determine whether an international joint through rate, assessed upon shipments moving from a point upon a foreign railroad in an adjacent foreign country to a United States destination, a United States carrier being a party of the through rate, has been unreasonable in violation of Section 1 of the Interstate Commerce Act, and to make an order authorizing and requiring the United States carrier to pay, as reparation, the difference between the charges collected under that rate and those which would have accrued under a rate deemed by the Commission to have been reasonable; *it being made to appear affirmatively that the United States carrier performing the transportation service from the point upon the international boundary line where the shipments entered the United States to their destination has maintained contemporaneously a reasonable and lawful domestic rate upon the traffic in question, applicable from the boundary line to the United States destination.*

As pointed out by the court below (Tr., p. 78), the question is not as to the powers of Congress, under the Constitution, to regulate international commerce, but whether the jurisdiction assumed by the Commission has been conferred and now exists, under the Interstate Commerce Act. That question has been fully and finally settled by the decision of this court, in

News Syndicate Co. v. N. Y. C. R. R. Co., et al. (1927), 275 U. S. 179; 72 L. ed. 225.

In the proceedings out of which that case arose, the international rate assessed upon certain shipments which moved from a point in Ontario, via the Niagara frontier, to New York City, was found unreasonable by the Commission, and reparation was awarded. The case therefore resembles the instant case quite closely; but there is one essential distinction which, in view of the express language of the opinion, becomes of controlling importance: namely, that whereas in the *News Syndicate Case* the United States carriers parties to the through rate and transportation had failed to publish or maintain *any rate whatsoever, reasonable or otherwise,* from the international boundary line to New York City, in this case the respondent, the United States carrier which transported petitioner's shipments from the international boundary to their destination, maintained at all times during the period of movement a rate from the boundary line to San Francisco, applicable upon those shipments, which was reasonable and lawful.

In its brief (pp. 6-8) petitioner makes lengthy reference to the questions certified to this court by the Circuit Court of Appeals for the Seventh Circuit in the *News Syndicate Case,* and to the categorical answers thereto made by this court, but omits all reference to the opinion which precedes those answers. Apparently petitioner considers the lengthy discussion which explains the basis for the court's unanimous conclusions to be mere surplusage, entitled to no respect, and believes that the lower court erred in hav-

ing quoted and relied upon those portions of this court's opinion.

In connection with its reply to the first question certified in the *News Syndicate Case,* this court said (275 U. S., at pp. 186 et seq.):

> "The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York city. Section 1 (1) and (2). It was the duty of defendants in error to establish just and reasonable rates for that service. Section 1 (5); Section 6 (1) and (7). They failed to make or publish any rate applicable to that part of the transportation. Section 8 makes them liable for damages sustained in consequence of such failure. Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error. Its right to reparation does not depend upon the amounts retained by defendants in error pursuant to agreed divisions. *Louisville & N. R. Co. v. Sloss-Sheffield Steel & I. Co.,* 269 U. S. 217, 231, 70 L. ed. 242, 249, 46 Sup. Ct. Rep. 73. Their breach of the statutory duty was a proximate cause of the losses complained of. The failure to establish rates covering the transportation from the international boundary contravened the provisions of the Act and compelled plaintiff in error to pay the through charges complained of. The Commission had jurisdiction to determine whether plaintiff in error was entitled to an 'award of damages under the provisions of this Act for a violation thereof.' Section 16(1). And it was the duty of the Commission to ascertain

the damages sustained. It is obvious that, in the ascertainment of damages, the Commission had jurisdiction to determine the reasonableness of the charges exacted."

It will be particularly noted that this court did not declare that the publication and maintenance of the joint through rate found unreasonable was a violation of the Interstate Commerce Act, but that it was "the failure to establish rates covering the transportation from the international boundary" line which contravened the Act and caused the shipper to be damaged.

In its discussion of its reply to the second question this court said (275 U. S., pp. 187, 188):

"The Commission did not specifically find whether the portions of the charges fairly attributable to transportation within the United States were excessive to the extent that the through rates were found unreasonable. While the findings seem to indicate that the Commission held the entire excess should be charged against the American lines, we shall consider the question on the basis therein stated. The Canadian lines furnishing the transportation from Therold to the international boundary were not before the Commission and were not sued. The defendants in error participated in the making of the through rate and actually collected the excessive charges. By their failure to comply with the Act, plaintiff in error was compelled to pay charges based on the through rates. On the facts stated, the Commission was authorized to hear the complaint, Section 13 (1), and had jurisdiction to make the

order. Section 16 (1). The question should be answered in the affirmative."

It will be observed that this court emphasized especially that the violation of the Interstate Commerce Act, from which the damages flowed, lay in the failure of the United States carriers to maintain *any* rate applicable to the transportation within the United States of the shipments in question. If such a rate had been maintained, meeting the requirements of the Act, there would have been no violation of law upon which the Commission might predicate an award, for that Commission can award damages *only for violations of the Act* by carriers subject to its jurisdiction.

In the instant case, as fully appears from the record, and particularly from the opinion of the lower court, respondent fulfilled the requirements of law set forth by this court in the *News Syndicate Case*. That decision has been recognized as defining completely the character of the duty laid upon a United States carrier which participates in the transportation, under an international through rate, of shipments from a point in an adjacent foreign country to a domestic destination, and the circumstances under which the Commission may award reparation for the assessment of an international rate. The decision of the lower court is based squarely upon, and conforms directly with, the pronouncements of this court. There is no sound reason for the issuance of the writ prayed for by petitioner.

2. The respondent fulfilled its duty under the Interstate Commerce Act, as interpreted in the News Syndicate Case, in that it maintained a reasonable rate applicable to that part of the transportation of complainant's shipments which took place within the United States.

At pages 8 and following of its brief, petitioner attempts to avoid the application of the principles laid down in the *News Syndicate Case,* by arguing that although respondent maintained a rate applicable to carload shipments of petitioner's commodity from the international boundary line at Nogales to San Francisco, that rate was not applicable to complainant's shipments moving from a point in Mexico; that consequently respondent failed in the duty laid upon it by the Act, as construed in the *News Syndicate Case,* to maintain a reasonable rate applicable to that part of the transportation which took place within the United States; and that therefore the Commission was empowered to exercise jurisdiction in the same manner as in the proceedings which led to the *News Syndicate Case.*

In this connection petitioner refers to the international joint through rate, and asserts that the publication of that rate made it the *only* rate which could have applied under the law, citing:

B. & O. S. W. R. R. Co. v. Settle (1922), 260 U. S. 166; 67 L. ed. 189.

In that case it was held that, *under the Interstate Commerce Act,* the publication of a through rate between any two points (subject to the Act) makes

that rate alone applicable, and that possible combinations of intermediate local rates cannot be applied in lieu of the published through rate. However, the *Settle Case* has reference only to transportation between points in the United States coming wholly within its scope. The Act, by the very terms of Section 1, (pars. 1, 2) does not apply to the *entire* transportation of a shipment from an adjacent foreign country to a destination in the United States, and cannot apply to the service performed before the shipment reaches the boundary line. It can and does apply, as this court said in the *News Syndicate Case*, only to the service performed from the international boundary line to the United States destination. The rule of the *Settle Case* could not be invoked to prevent the application, for example, of the local rate of the Mexican carrier from the Mexican point of origin to the point upon the boundary line at which the shipment entered the United States, and subsequently of the local rate of the United States carrier from the latter point to the United States destination. As applied to the *instant* case the decision in the *Settle Case* simply means that for transportation *coming within the scope of the Act* only a rate named in tariffs filed with the Commission can be used. That rate, however, might be either the international rate, which the petitioner paid, or the domestic rate from Nogales to San Francisco, which was also published, and available to the petitioner. Certainly the rule of the *Settle Case* does not import that the scope of the Act must or can be extended beyond the boundary line, contrary to

the express limitations of Section 1, into the territory of the adjacent foreign country, so as to compel shippers there to use, and foreign carriers to observe, a published joint through rate as the *only* applicable rate, or forbid a shipper from billing shipments originating in Mexico at the local rate from point of origin to the boundary line, and rebilling thence to a United States destination at the domestic rate. Nor can there be any violation of the Act if the United States carrier accepts a shipment tendered at the boundary line, and transports it to a United States destination at the domestic rate.

The language of this court in the *News Syndicate Case* affords a complete and conclusive answer to petitioner's argument in this connection. In the answer to the second question this court particularly pointed out that the failure of the carriers there before it to comply with the Act, by establishing a just and reasonable rate for the transportation service from the boundary line to the United States destination, compelled the shippers to pay charges based on the through rates. The conclusion is obvious that if a reasonable domestic rate had been available, the shipper would not have been compelled to pay the international rate, but instead could have used the domestic rate, which would have been as properly applicable as the international rate, at the shipper's election.

Petitioner cites (Brief, p. 11) three decisions of the Commission issued since the *News Syndicate Case*

was decided in which, so it is stated, the Commission holds that it may award reparation against international rates, regardless of the maintenance of rates applicable to the transportation service performed within the United States. In those proceedings, surprising as it may seem, the Commission has asserted that its conclusions are based upon the principles laid down in the *News Syndicate Case.* It is unnecessary to discuss those decisions at length. To the extent that the Commission undertakes to award reparation against alleged unreasonable international rates, regardless whether rates are maintained applying to the transportation service to or from the international boundary line, its decisions are erroneous, and in direct conflict with the essential principle of the decision upon which they purport to rely.

Other decisions of the Commission cited by petitioner (Brief, pp. 11, 12) were decided prior to the *News Syndicate Case,* and obviously possess no more authoritative weight than the decision upon which petitioner's suit is based. The controlling principles which apply here have been sufficiently laid down in the *News Syndicate Case;* and their applicability cannot be avoided by the multiplication of citations of decisions of the Commission. It may be noted, however, that while the Commission has from time to time undertaken to exercise jurisdiction in cases of this kind, it has done so with the primary purpose of obtaining final and authoritative rulings from the courts defining the extent of its powers. In many cases vigorous dissenting opinions have been regis-

tered; and in at least one case cited by petitioner (*International Nickel Co. v. Director General*, 66 I. C. C. 627) it was expressly stated that the Commission desired the matter to be carried into the courts, so that it might obtain proper guidance in future cases. In any event, the Commission's persistence in an erroneous construction and application of the Act, particularly after it has been fully interpreted by this court, though possibly somewhat surprising, cannot be permitted to prevail as against the definite pronouncements of this court, or impose liabilities or duties when none exist under the statute.

> *U. S. v. Mo. Pac. R. Co.* (1929) 278 U. S. 269; 73 L. ed. 322 (and see the exhaustive annotation which accompanies the report of this case in Lawyers' Edition, relative to the doctrine of practical construction of statutes).

Petitioner asserts that unless the rule of the *Settle Case* be held to apply, so as to compel foreign carriers to observe the Act as controlling their operations and charges, the central and controlling purpose of the Act will be defeated, in that there will be exceptions to the rule that there must be only one rate for the similar carriage of freight, which rate must be charged. It cites:

> *Armour Packing Co. v. U. S.* (1908), 209 U. S. 56, 81; 52 L. ed. 687;
>
> *Boston & Maine R. R. Co. v. Hooker* (1913), 233 U. S. 97, 110; 58 L. ed. 868;
>
> *L. & N. R. R. Co. v. Maxwell* (1915), 237 U. S. 94, 97; 59 L. ed. 853.

These cases all involved primarily transportation between points in the United States; none of them involved transportation from a point in an adjacent foreign country, by an all-rail route, to a United States destination. Moreover, they all arose prior to 1920, when Congress amended the Act so as to provide expressly that it should apply to the transportation of shipments from or to an adjacent foreign country, *only in so far as such transportation takes place within the United States.* Compare Section 1 of the Act as it existed prior to 1920 (36 Stat. L. 544), with the corresponding section as it now reads (U. S. Code, tit. 49, Sect. 1 (1, 2); 41 Stat. L. 474).

However, refusal to extend the rule of the *Settle Case* into Mexico, so as to control the rates to be applied there, does not result in defeating the central purpose of the Act. Both the international rate and the domestic rate from the boundary line were equally known and available to petitioner, being published in tariffs duly on file. If petitioner believed that the international rate was unreasonable, it could readily have avoided its assessment by causing its shipments to be billed from the Mexican point of production to the boundary line, and thence re-billed at the domestic rate. If the latter rate were objectionable, petitioner had a ready remedy, for it was admittedly subject to the jurisdiction of the Commission, which could require the carrier assessing it to pay reparation to the extent that it might exceed a reasonable figure.

Petitioner also asserts that the domestic rate could not have been applicable because it was not charged

and applied; that if it were applicable, the respondent violated the Act by its failure to apply that rate instead of the international through rate. That assertion depends upon the premise that once the domestic rate is determined to be applicable, it becomes the *only* applicable rate, from which there can be no departure. That premise depends in turn upon the assumption that the rule of the *Settle Case* governs the entire transportation service. Since that rule does not control, as already shown, petitioner's argument has no foundation, and needs no further reply. However, it may be noted that petitioner is apparently attempting to inject into the case a new issue not presented by the pleadings. In its complaint in the trial court, petitioner charged respondent with a violation of Section 1 of the Act only, in that an *unreasonable* rate had been assessed. It is now apparently attempting to charge respondent with having violated Section 6, in that it has applied and collected some charge other than that contained in its published tariff. This accusation obviously has no foundation, for the reason that both the international rate (which was assessed), and the domestic rate (which was available to the petitioner at its election), were alternatively applicable, depending upon the shipper's choice.

The court below correctly decided that the respondent complied with its duty under the Interstate Commerce Act, as defined by the *News Syndicate Case,* in that it maintained a lawful and reasonable rate applicable to that part of the transportation service here involved which took place within the United States.

Therefore, that court properly applied the principles stated in that decision in concluding that the Commission was without jurisdiction to make the order upon which petitioner's action is founded.

3. Respondent, having fulfilled its duty, under the Act, to maintain a reasonable rate applicable to the transportation service performed within the United States, committed no violation of the Act in collecting charges based upon the international through rate.

In the concluding subdivision of its brief (pp. 12-16) petitioner argues in effect that the opinion in the *News Syndicate Case* does not define the legal requirements to be fulfilled by United States carriers who participate in and perform transportation service to which international through rates are applied. It is asserted that although, as the lower court held, respondent fully complied with the duty laid upon it under the Act as interpreted by this court, in publishing and maintaining a reasonable domestic rate from the boundary line to the United States destination, it nevertheless violated the Act by collecting charges based upon the international rate afterwards declared by the Commission to have been unreasonable, and thereby inflicted upon the petitioner legal damage which the Commission was empowered to recognize.

This argument rests upon the essential, but fallacious, premise that the international rate was, in a legal sense, unreasonable, and therefore in violation of the Act. Petitioner must necessarily assume that

the Act applies to and controls that rate *in its entirety*, and that the Commission can extend its jurisdiction beyond the international boundary, into the adjacent foreign country, and determine whether the through rate, though applying in part to transportation service performed by a foreign carrier, operating in a territory admittedly not within the scope of the Act, is *as a whole* unreasonable. The Act has no such application. By its very terms, it can and does apply to and control such an international transportation service only to the extent that it is performed within the United States; and the Commission therefore cannot undertake to determine whether the entire rate, as applied to the *entire* transportation, is or has been reasonable or lawful, but only whether a reasonable charge was made for the service rendered within the United States. In the instant proceeding, there was no allegation, proof, or finding that petitioner was charged an unreasonable amount for the service performed in the United States by respondent. In fact, the record completely fails to show what charge was made for that service, and no finding with respect thereto has ever been made, either by the trial court or by the Commission.

The record does, however, show that the respondent maintained, and held out to petitioner the opportunity to use, a reasonable rate from the boundary. It thus fulfilled its full duty under the Act as interpreted by this court in the *News Syndicate Case*. The petitioner chose not to accept that opportunity, although it might

thereby have avoided the damage of which it now complains; it elected instead to bill its shipments under the international through rate. Any damage caused by the assessment of the latter is therefore due entirely to petitioner's voluntary choice, and not to any violation of the Act by respondent.

In concluding its brief, petitioner asserts that the decision of the court below, if sustained, will operate to prevent the Commission from asserting any effective control over international through rates applied upon traffic to and from adjacent foreign countries. It offers a number of illustrations in which it portrays the results which it expects to follow. These illustrations all depend upon the erroneous view that the lower court has held that an international through rate is wholly free from the restraints of paragraph (5) of Section 1 of the Act; and the deduction drawn from that assumption, that if that portion of the statute is not controlling, other sections are likewise without application. The lower court made no such decision. It declared, in simple and direct language, that since the respondent complied with the duty placed upon it by the Act as construed by this court, the Commission, whose power to award damages can be exercised only when the Act has been violated, had no jurisdiction in the instant case. It did not undertake to declare that paragraph (5) of Section 1, or any other section of the Act, would not operate to restrain the publication and assessment of unreasonable or otherwise unlawful international rates under

circumstances other than those presented in the instant case: e. g., if no lawful rate applicable to the domestic transportation service were available, or if it were alleged and proved that an unlawful charge had been or would be exacted for transportation service performed within the United States, and thus within the statutory limits of the Commission's jurisdiction.

We have already pointed out that, as the lower court states in its opinion, the question here involved does not relate to the power of Congress under the Constitution, but to the jurisdiction conferred upon the Commission by the Act. That jurisdiction is limited, insofar as traffic to and from adjacent foreign countries is concerned, to the transportation service performed within the United States (Interstate Commerce Act, Section 1, paragraphs 1, 2). All of the concluding portion of petitioner's argument is addressed, not to the correctness of the conclusions reached by this court in the *News Syndicate Case* and by the lower court in the case at bar, relative to the meaning and application to be given to that limitation, but entirely to the propriety of the legislative action which placed it in the statute. The limitation must be given proper effect by the courts as long as it exists. Whether or not it should be a part of the Act is purely a question of legislative policy, which the Congress and not the courts must decide.

CONCLUSION.

Petitioner offers no adequate reason for the issuance of the writ prayed for. The federal question of substance here presented has been decided by the state court in exact conformity with the applicable and controlling principles set forth in this court's recent decision. The fact that the decision may not accord entirely with conclusions reached by the Interstate Commerce Commission in various cases before that tribunal is not a sufficient ground for review by this court. The petition should be denied.

Respectfully submitted,

HENLEY C. BOOTH,
JAMES E. LYONS,
Attorneys for Respondent.

Due service and receipt of a copy of the within is hereby admitted this_____day of November, 1930.

_____

Attorney for Petitioner.

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APR 20

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1930

No. 520

LEWIS-SIMAS-JONES COMPANY,
Petitioner,

v.

SOUTHERN PACIFIC COMPANY,
Respondent.

BRIEF FOR RESPONDENT

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Index

	Page
Preliminary Statement	1
Statutes Relied Upon	4
Summary of Argument	4
Argument	6
1. The decision of the District Court of Appeal is squarely in accord with the controlling pronouncements of this Court in *News Syndicate Co. v. N. Y. C. R. R. Co.*, 275 U. S. 179	6
2. The respondent complied with its duty under the Interstate Commerce Act, as construed by this Court in the *News Syndicate Case*, in that it maintained a reasonable rate applicable to that part of the transportation of petitioner's shipments which took place within the United States	13
3. Respondent, having complied with its duty under the Act to maintain a reasonable rate applicable to the transportation service performed within the United States, committed no violation in collecting charges based upon the international through rate	22
4. Various decisions of the Interstate Commerce Commission cited and relied upon by petitioner and amicus curiae are of no value as precedents supporting the exercise of the jurisdiction here asserted	28
5. Affirmance of the decision here under review will not hamper the exercise by the Interstate Commerce Commission of the jurisdiction conferred upon it by law, to control rates and charges of United States carriers participating in traffic moving to or from adjacent foreign countries	32
6. The transportation of petitioner's shipments was performed pursuant to contracts entered into between the Mexican carrier and the consignors, which contracts are binding upon petitioner	38
7. Further reply to certain contentions advanced in brief of amicus curiae	42
Conclusion	53

Table of Authorities Cited

	Page
Armour Packing Co. v. U. S. (1908), 209 U. S. 56, 81; 52 L. ed. 687	19
A. T. & S. F. Ry. Co. v. Ariz. Grocery Co. (U. S. C. C. A., 9th; Mar. 23, 1931), ____ F. (2)	22
B. & O. S. W. R. R. Co. v. Settle (1922), 260 U. S. 166; 67 L. ed. 189	13
Boston & Maine R. Co. v. Hooker (1913), 233 U. S. 97, 110; 58 L. ed. 868	19
Boston Wool Trade Assn. v. A. T. & S. F. Ry. Co. (1923), 83 I. C. C. 445	26, 34
Brewster v. Gage (1930), 280 U. S. 327, 337; 74 L. ed. 457	20
Canales v. G. H. & S. A. Ry. Co. (1916), 37 I. C. C. 573	34
Cin. New Orleans & Texas P. R. Co. v. I. C. C. (1896), 162 U. S. 184; 40 L. ed. 935	51
Corpus Juris, Vol. 51, p. 114, Notes 55 and 56	31
Cyanamid, etc. from Niagara Falls (1929), 155 I. C. C. 488	47
Cyc., Vol. 36, p. 1165	20
Elimination of Grand Trunk Ry. from Certain Routes (1926), 115 I. C. C. 609	15
Fernandez v. S. P. R. R. Co. of Mex. (1925), 104 I. C. C. 93	34
Ill. C. R. R. Co. v. I. C. C. (1907), 206 U. S. 411; 51 L. ed. 1128	51
International Nickel Co. v. Director-General, 66 I. C. C. 627	29
Lewis-Simas-Jones Co. v. S. P. Co. (1925), 102 I. C. C. 45	3
Lewis-Simas-Jones Co. v. S. P. Co. (1930), ____ Cal. App. ____; 289 Pac. 643	4
Liverpool, etc. Co. v. Phoenix Ins. Co. (1889), 129 U. S. 397, 458; 32 L. ed. 788, 798	39
L. & N. R. Co. v. Maxwell (1915), 237 U. S. 94, 97; 59 L. ed. 853	19
L. & N. R. Co. v. Central Iron Co. (1924), 265 U. S. 59, 70; 68 L. ed. 900	40
L. & N. R. Co. v. U. S. (1925), 267 U. S. 395, 397; 69 L. ed. 678, 680	40

Pages

Minn. Rate Cases (1912), 230 U. S. 352, 421; 57 L. ed. 1511, 1550 ____ 31

Mitchell Coal Co. v. Pa. R. R. Co. (1913), 230 U. S. 247, 258; 57 L. ed. 1472 ____ 31

N. Y. C. R. R. Co. v. N. Y. & P. R. Co. (1926), 271 U. S. 124; 70 L. ed. 865 ____ 31

News Syndicate Co. v. N. Y. C. R. R. Co., et al. (1927), 275 U. S. 179; 72 L. ed. 225 ____ 5, 7

Northern Pac. Ry. Co. v. Wall (1916), 241 U. S. 87, 91; 60 L. ed. 905, 907 ____ 39

Phillips v. Grand Trunk Ry. Co. (1915), 236 U. S. 662, 665; 59 L. ed. 774 ____ 31

Pittsburgh, C. C. & St. L. R. Co. v. Fink (1919), 250 U. S. 557; 63 L. ed. 1151 ____ 40

Publication of Rates Between United States and Canada (1928), 147 I. C. C. 778 ____ 17

Rates on Petroleum and Petroleum Products (1927), 128 I. C. C. 545 ____ 15

San Diego Chamber of Commerce v. A. & V. Ry. Co. (1925), 102 I. C. C. 27 ____ 15

Seymour v. M. L. & T. R. & S. Co. (1915), 35 I. C. C. 492 34

Tariff Circular 18-A, Rule 72 ____ 15

U. S. v. Mo. Pac. R. Co. (1929), 278 U. S. 269; 78 L. ed. 322 ____ 30

U. S. v. P. & A. R. & N. Co. (1913), 228 U. S. 87; 57 L. ed. 742 ____ 49

Watab Paper Co. v. Canadian National Ry. Co. (1929), 152 I. C. C. 265, 268 ____ 15

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1930

No. 520

LEWIS-SIMAS-JONES COMPANY,
Petitioner,

v.

SOUTHERN PACIFIC COMPANY,
Respondent.

BRIEF FOR RESPONDENT

PRELIMINARY STATEMENT.

Under the title "Statement of the Case", petitioner sets forth in its brief (pp. 1-3) what is apparently intended to be a summary of the essential facts of this proceeding. A very similar statement of the facts appears in the brief of Amicus Curiae (pp. 8-12). Neither of these statements is complete or wholly accurate. The statement appearing in the opinion of the lower appellate court (R., 46, 47) is, however,

correct and complete, and recites the essential facts quite accurately.

As appears from that opinion, and from the findings made by the trial court (R., 38-43), petitioner, at San Francisco, received from respondent during 1923, three carload shipments of cow peas which had been transported by rail from Navojoa, Sonora, Mexico, over the line of the Southern Pacific Railroad Company of Mexico to the international boundary line at Nogales, Arizona, and thence over respondent's line to San Francisco. These shipments moved under through bills of lading, executed by the Mexican carrier and duly issued at Navojoa to the several shippers. The transportation charges, which were collected by respondent from petitioner, at San Francisco, were based upon an international joint through rate of $1.33 per 100 pounds, participated in by the Mexican carrier and the respondent jointly, and named in tariffs filed with the Department of Communications and Public Works of Mexico, and with the Interstate Commerce Commission (R. 40).

In 1924, some time after the delivery of the shipments and the payment of the charges, petitioner filed a complaint with the Commission, alleging that the $1.33-rate assessed, and the charges collected thereunder, had been unreasonable, in violation of Section 1 of the Interstate Commerce Act. That allegation was denied, by answer duly filed with the Commission by the respondent as defendant. In due course,

the Commission rendered its opinion and order, in which it overruled respondent's motion for dismissal of the complaint for lack of jurisdiction, and found and declared that the rate complained of had been unreasonable, and that petitioner had been damaged by its collection; and ordered respondent to pay reparation in the amount of the difference between the charges collected, and those which would have accrued under a rate deemed by the Commission to have been reasonable. The Commission's decision is reported as:

Lewis-Simas-Jones Co. v. S. P. Co. (1925), 102 I. C. C. 45;

and a copy thereof is annexed to the complaint before the trial court (R., 3-5).

Respondent declined to comply with the Commission's order, whereupon petitioner brought suit in the Superior Court of the State of California, as contemplated by Section 16 of the Interstate Commerce Act. The defense raised was that the Commission's order was void, because in excess of the jurisdiction conferred upon it by the Act. In support of that defense respondent proved, and the trial court found, that at all times during which the shipments moved respondent had published and maintained a rate, applicable to that part of the transportation of petitioner's shipments which took place within the United States (i. e., from the international boundary line at Nogales to San Francisco), which was neither alleged, nor proved, nor found, in the proceeding before the

Commission, to have been unreasonable, and which was in fact at all such times reasonable and lawful (R., 41, 42). The trial court concluded, upon the basis of the facts proved, that the Commission's order was void for lack of jurisdiction, and rendered judgment for the respondent. Upon appeal, the judgment was affirmed by the District Court of Appeal of California in:

Lewis-Simas-Jones Co. v. S. P. Co. (1930), ... Cal. App. .....; 289 Pac. 643;

(R., 46-51). That decision was sustained by the Supreme Court of California, through refusal to grant petitioner a hearing of the cause after denial of rehearing by the Appellate Court (R., 51).

STATUTES RELIED UPON.

The relevant portions of the statutes relied upon are set forth in the Appendix to this brief. They consist of Section 1, paragraph 1, of the Act to Regulate Commerce, as it existed prior to 1920 (36 Stat. L. 544); and paragraphs 1 and 2 of Section 1 of the Interstate Commerce Act, as amended by the Transportation Act, 1920 (49 U. S. C. 1, paras. 1, 2; 41 Stat. L. 474).

SUMMARY OF ARGUMENT.

1. The decision of the District Court of Appeal is squarely in accord with the controlling pronounce-

ments of this Court in *News Syndicate Co. v. N. Y. C. R. R. Co.*, 275 U. S. 179.

2. The respondent complied with its duty under the Interstate Commerce Act, as construed by this Court in the *News Syndicate Case*, in that it maintained a reasonable rate applicable to that part of the transportation of petitioner's shipments which took place within the United States.

3. Respondent, having complied with its duty under the Act to maintain a reasonable rate applicable to the transportation service performed within the United States, committed no violation in collecting charges based upon the international through rate.

4. Various decisions of the Interstate Commerce Commission cited and relied upon by petitioner and Amicus Curiae are of no value as precedents supporting the exercise of the jurisdiction here asserted.

5. Affirmance of the decision here under review will not hamper the exercise by the Interstate Commerce Commission of the jurisdiction, conferred upon it by law, to control rates and charges of United States carriers participating in traffic moving to or from adjacent foreign countries.

6. The transportation of petitioner's shipments was performed pursuant to contracts entered into between the Mexican carrier and the consignors, which contracts are binding upon petitioner.

7. Further reply to certain contentions advanced in brief of Amicus Curiae.

ARGUMENT.

1. THE DECISION OF THE DISTRICT COURT OF APPEAL IS SQUARELY IN ACCORD WITH THE CONTROLLING PRONOUNCEMENTS OF THIS COURT IN NEWS SYNDICATE CO. v. N. Y. C. R. R. CO., 275 U. S. 179.

The essential issue presented in this proceeding may be stated as follows: Does the Interstate Commerce Commission possess jurisdiction, under the Interstate Commerce Act, to determine whether an international joint through rate, assessed upon shipments moving by rail from a point in Mexico to a United States destination, a domestic carrier being party to such through rate, has been unreasonable, in violation of Section 1 of the Act, and to order the United States carrier to pay as reparation the difference between the charges collected and those accruing under a rate deemed by the Commission to have been reasonable, *when it is affirmatively made to appear that the domestic carrier which transported the shipments from the boundary line to final destination has contemporaneously maintained a reasonable and lawful rate, applicable upon the traffic in question, from the point upon the boundary line at which the shipments entered to the destination within the United States?*

The issue thus presented does not relate to the powers of Congress, under the Constitution, to regulate commerce with foreign nations, but solely to the jurisdiction conferred upon the Commission, and now existing, by the terms of the Act. That question was directly passed upon by this Court, in

News Syndicate Co. v. N. Y. C. R. R. Co., et al. (1927), 275 U. S. 179; 72 L. ed. 225.

In the proceedings out of which that case arose, an international rate which had been assessed upon certain shipments moving from a point in Canada, via the Niagara frontier, to New York City was found by the Commission to have been unreasonable, and reparation was awarded. The case therefore resembles the instant proceeding quite closely; but there is one essential distinction which, in view of the express language of this Court in the opinion, becomes of the greatest importance: namely, that whereas in the *News Syndicate Case* the United States carriers, parties to the joint through rate, had failed to maintain or publish *any* rate whatsoever, reasonable or otherwise, from the international boundary line to New York City, *in the instant case respondent, the domestic carrier which handled petitioner's shipments from the international boundary line to San Francisco, has duly maintained a rate from the boundary line, applicable to the transportation service from that point to San Francisco, which was proved and found to be reasonable and lawful* (R. 41-42).

In its brief (pp. 5-7), as in the brief in support of its petition for a writ of certiorari (pp. 6-8), petitioner makes lengthy reference to certain questions which were certified to this Court in the *News Syndicate Case,* and to the categorical affirmative answers made to those questions; but for some unexplained reason it fails to quote and indeed utterly disregards the lengthy opinion which accompanies those answers, wherein this Court has undertaken to interpret and apply the pertinent provisions of the Act. Apparently petitioner believes that the unanimous opinion of this Court, whereby its replies to the certified questions are explained, is mere surplusage, entitled to no respect or regard whatsoever, and considers that the lower court, which quoted at length from that opinion and pointed out wherein its own decision rested thereon, has in that respect fallen into outright error.

In connection with its reply to the first question certified to it, this Court said (275 U. S., at pp. 186, 187):

> "The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York City. Section 1(1) and (2). It was the duty of defendants in error to establish just and reasonable rates for that service. Section 1(5); Section 6(1) and (7). They failed to make or publish any rate applicable to that part of the transportation. Section 8 makes them liable for damages sustained in consequence of such failure.

Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error. Its right to reparation does not depend upon the amounts retained by defendants in error pursuant to agreed divisions. *Louisville & N. R. Co. v. Sloss-Sheffield Steel & I. Co.*, 269 U. S. 217, 231, 70 L. ed. 242, 249, 46 Sup. Ct. Rep. 73. Their breach of the statutory duty was a proximate cause of the losses complained of. The failure to establish rates covering the transportation from the international boundary contravened the provisions of the Act and compelled plaintiff in error to pay the through charges complained of. The Commission had jurisdiction to determine whether plaintiff in error was entitled to an 'award of damages under the provisions of this Act for a violation thereof.' Section 16(1). And it was the duty of the Commission to ascertain the damages sustained. It is obvious that, in the ascertainment of damages, the Commission had jurisdiction to determine the reasonableness of the charges exacted."

It is to be noted especially that this Court did not declare, or even indicate, that the publication and maintenance of the international joint through rate was a violation of the Act; it specifically stated that it was the carrier's "failure to establish rates covering the transportation from the international boundary" which "contravened the provisions of the Act", and caused the shipper to be damaged.

In discussing its reply to the second question, this Court said further (275 U. S., at pp. 187, 188):

> "The Commission did not specifically find whether the portions of the charges fairly attributable to transportation within the United States were excessive to the extent that the through rates were found unreasonable. While the findings seem to indicate that the Commission held the entire excess should be charged against the American lines, we shall consider the question on the basis therein stated. The Canadian lines furnishing the transportation from Thorold to the international boundary were not before the Commission and were not sued. The defendants in error participated in the making of the through rate and actually collected the excessive charges. By their failure to comply with the Act, plaintiff in error was compelled to pay charges based on the through rates. On the facts stated, the Commission was authorized to hear the complaint, Section, 13(1), and had jurisdiction to make the order. Section 16(1). The question should be answered in the affirmative."

It will be observed that this Court again emphasized that the violation of the Act, out of which the damage arose, lay in the failure of the United States carriers to comply with their obligation under the Act to maintain a just and reasonable rate, or indeed *any* rate, applicable to that part of the transportation service which took place within the United States. If such a rate had been maintained, conforming to the require-

ments of the Act, then there would have been no violation of law with respect to which the Commission might award reparation. Of course, it is obvious (and indeed, both petitioner and Amicus Curiae apparently concede) that if there is no failure by the carrier to conform to the duty imposed by the Act, there is no offense to which the Commission's jurisdiction may attach, for the Commission is empowered to award damages only when they are occasioned by a violation of the Act, by carriers subject thereto.

It will be noted (R. 49, 50) that the lower court incorporated in its opinion most, if not all, of the excerpts from the opinion in the *News Syndicate Case* which are reproduced above. Its decision is predicated squarely upon the controlling pronouncements of this Court, and it has recognized the decision cited as defining fully the circumstances under which the Commission is empowered to award reparation for the collection by a United States carrier of charges based upon an international joint through rate. Particularly, the District Court has recognized that this Court has very clearly pointed out that the Commission's jurisdiction must be predicated upon a showing that the United States carrier has failed to fulfil its obligation, under the Act, to maintain a just and reasonable rate applicable to the transportation service performed within the United States; that when it affirmatively appears that that obligation has been discharged, there is no violation of law inherent in the

charging of an international joint through rate, whatever its relative level, and the Commission has no jurisdiction to award damages in the premises.

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2. THE RESPONDENT COMPLIED WITH ITS DUTY UNDER THE INTERSTATE COMMERCE ACT, AS CONSTRUED BY THIS COURT IN THE NEWS SYNDICATE CASE, IN THAT IT MAINTAINED A REASONABLE RATE APPLICABLE TO THAT PART OF THE TRANSPORTATION OF PETITIONER'S SHIPMENTS WHICH TOOK PLACE WITHIN THE UNITED STATES.

While our opponents apparently concede that the instant case is controlled by the principles laid down in the *News Syndicate Case,* they undertake to avoid the application of those principles. They argue that although a reasonable rate was maintained by respondent, applicable to the transportation of carload shipments of its commodity from the international boundary line at Nogales to San Francisco, such rate was not applicable to shipments moving from a point in Mexico under through bills of lading executed and issued at Navojoa by the Mexican carrier; that consequently respondent did not maintain any rate applicable to the transportation within the United States of the shipments in issue, and thus failed to comply with the duty laid upon it by the Act as interpreted in the *News Syndicate Case* (see Petitioner's Brief, pp. 7-9; Brief of Amicus Curiae, pp. 14, 23, 36-37).

The essence of our opponents' argument is simply that the publication, and filing with the Commission, of a tariff naming a joint through rate from Navojoa, via Nogales, to San Francisco made that rate *exclusively* applicable, and that the contemporaneous rate from Nogales to San Francisco, whether reasonable or not, could not have been applied to the transportation service within the United States, in lieu of the published through rate. Both petitioner and Amicus Curiae rely, in this behalf, upon this Court's decision in:

B. & O. S. W. R. R. Co. v. Settle (1922), 260 U. S. 166; 67 L. ed. 189.

In the *Settle Case* it was held that, *under the Interstate Commerce Act*, the publication of a rate between any two points (within the United States) makes such rate exclusively applicable, and prohibits the application of possible combinations of intermediate local rates for the purpose of defeating the published through rate. The doctrine of that case, however, applies only to transportation coming within the scope of the Act. Transportation from a point in an adjacent foreign country to a United States destination is not subject to the Act, except to the extent that the transportation takes place within the United States. By the very terms of Section 1, paragraphs 1, 2, the Act does not apply to that transportation service in its entirety, and cannot apply to the service performed upon the lines of the foreign carrier, prior to the arrival of the shipment at the boundary line.

The rule of the *Settle Case* is simply a rule of interpretation of the Act. Neither that rule, nor any other rule of interpretation of the Act, made either by the Courts or the Commission, can be extended beyond the boundary line, into the territory of an adjacent foreign country, so as to control transportation services there performed, compelling shippers there to use, and foreign carriers to observe, a joint through rate as the *only* rate applicable. No provision of the Act can be invoked to forbid a shipper from billing a shipment, intended to move to a United States destination, at the local rate to the boundary line, and thence rebilling at the domestic rate. Such methods would secure to the shipper the benefit of combinations upon the international boundary, as suggested by petitioner (Brief, p. 9); but there is nothing in the Act to forbid the practice. Certainly there can be no violation of the Act, if a United States carrier accepts, at the boundary line, a shipment which has been duly transported to that point, and carries it to its ultimate destination in the United States, under a reasonable and lawful domestic rate.

The fundamental fallacy of the argument predicated upon the *Settle Case* lies in the assumption that an international joint through rate is governed by and subject to all of the requirements of the Interstate Commerce Act. That assumption is wholly incorrect. International joint through rates of the character here involved are not subject to the requirements of the Act, or to the Commission's jurisdiction. For ex-

ample, the Commission has itself declared that it cannot require carriers subject to its jurisdiction to establish, or to continue to participate, in international through rates.

San Diego Chamber of Commerce v. A. & V. Ry. Co. (1925), 102 I. C. C. 27;
Elimination of Grand Trunk Railway From Certain Routes (1926), 115 I. C. C. 609;
Rates on Petroleum and Petroleum Products (1927), 128 I. C. C. 545;
Watab Paper Co. v. Canadian National Ry. Co. (1929), 152 I. C. C. 265, 268.

While such rates may not be required, there is no prohibition of law upon their establishment and continuance. They may be maintained and applied, even though not published in tariffs on file with the Commission. Under the provisions of the Commission's Tariff Circular 18-A, in effect in 1923 and 1924, the publication of international rates was *encouraged and permitted* by the Commission, *as a great convenience* to shippers and carriers; *but it was not obligatory.*

Tariff Circular 18-A; Rule 72:

"Tariffs to or from Points in Adjacent Foreign Countries (adopted November 22, 1909).—Through rate and fares from points in the United States to points in foreign countries adjacent thereto and through rates and fares from points in adjacent foreign countries to points in the United States are a great convenience, and the

Commission therefore desires to permit and encourage the publication and filing of such through rates and fares under lawful and proper conditions. Therefore, and until further order of the Commission:

"A joint tariff naming rates or fares from a point in the United States to a point in Mexico or in Canada; from a point in Mexico or in Canada to a point in the United States; from a point in Mexico through the United States to a point in Canada; from a point in Canada through the United States to a point in Mexico; from a point in Mexico through the United States to a point in Mexico; from a point in Canada through the United States to a point in Canada; from a point in the United States through Mexico or through Canada to a point in the United States, must be concurred in, in form prescribed in these regulations and without reservation by all lines that are parties to the through rates or fares and that participate in transportation thereunder; or, a statement of the divisions of the rates or fares accruing to the roads in the United States to or from the border must be incorporated in the tariff or be filed with the Commission together with and at the same time the tariff itself is filed.

(Adopted March 7, 1910.) *The purpose of the above rule, requiring the domestic carriers to publish their divisions of rates and fares to and from Canada or Mexico, is to give to this Commission definite information as to their lawful earnings, and is not intended as a means of exercising any jurisdiction over carriers in adjacent foreign countries.*" (Italics ours.)

Compare, also, the Commission's opinion in:

Publication of Rates Between United States and Canada (1928), 147 I. C. C. 778.

It will be noted that petitioner and Amicus Curiae do not assert, or even attempt to contend, that the rate from the international boundary at Nogales to San Francisco, contemporaneously maintained by respondent, was not reasonable and lawful, and otherwise in conformity with the Act, or that it could not have been applied to these shipments, if any circumstances existed such as to render the international through rate inapplicable. Their essential argument is simply that that domestic rate could not lawfully have been applied to these shipments, solely because the joint through rate was published and filed. This argument in its turn is predicated wholly upon the theory that the Act applies to and controls the entire transportation service, including the portions thereof performed in Mexico prior to the arrival of the shipments at the international boundary line. It must be apparent that our opponents' contentions simply beg the question, for the very issue to be determined is whether the Act is controlling in the premises. Under its own self-expressed limitations (Section 1, paragraphs 1, 2), the Act, and the Commission's jurisdiction thereunder, cannot extend beyond the international boundary line into a foreign sovereignty, so as to govern the conduct of services there performed. It necessarily follows that the scope of the Act could

not be contended so as to compel foreign shippers to observe, and foreign carriers to apply, a joint through rate, regardless of the possible existence of local rates whose application might result in lower charges or other advantages.

A complete and conclusive answer to our opponents' argument predicated upon the *Settle Case* is afforded by the opinion in the *News Syndicate Case*. In that opinion this Court pointed out, at least twice, that the shipper had been "compelled to pay charges based upon the through rates", because of the failure of the United States carriers "to comply with the Act", by establishing just and reasonable rates for the transportation service from the boundary line to the domestic destination. The necessary conclusion must be that, in the view of this Court, if reasonable domestic rates had been provided, the shipper would not have been compelled to pay the international through rates, but instead could have elected to have the domestic rates applied; that the latter would have been as properly and legally applicable as the international through rate, dependent upon the shipper's choice.

Petitioner asserts (Brief, p. 9) that if the domestic rate from Nogales to San Francisco is held to have been alternatively applicable, concurrently with the international through rate, to the shipments here involved, the central and controlling purpose of the Act will be defeated, in that there will be exceptions to the rule that there shall be only one rate for the simi-

lar carriage of freight, which rate must be charged. Reference is made to this Court's decisions in:

Armour Packing Co. v. U. S. (1908), 209 U. S. 56, 81; 52 L. ed. 687;

Boston & Maine R. Co. v. Hooker (1913), 233 U. S. 97, 110; 58 L. ed. 868;

L. & N. R. Co. v. Maxwell (1915), 237 U. S. 94, 97; 59 L. ed. 853.

This argument again depends upon the essential premise that the entire transportation service here considered is subject to the provisions of the Act. The Act does not control, or in any wise affect, the service performed prior to the arrival of the shipment at the international boundary line. Moreover, the cited cases related primarily to transportation between points in the United States, to which, of course, the Act applies. None of them involved transportation from a point in an adjacent foreign country, over an all-rail route, to a destination in the United States. Furthermore, they were all decided prior to 1920, and necessarily in the light of the statute as it existed at that time. In 1920 the Act was amended, so as to read as at present, providing expressly that it applies to the transportation of shipments from or to an adjacent foreign country, *only insofar as such transportation takes place within the United States.* The statute prior to 1920 contained no such proviso (36 Stat. L. 544); but the corresponding section now embodies that specific and definite limitation (41 Stat. L. 474; 49

U. S. Code, Section 1, paragraphs 1, 2). Petitioner and Amicus Curiae both seek to persuade this Court to disregard entirely the purpose and effect of the proviso added in 1920. But the rule of construction is that an important change in phraseology such as this must be given full effect. The deliberate selection of language differing from that used in the earlier Act indicates that a change of law was intended.

Brewster v. Gage (1930), 280 U. S. 327, 337;
74 L. ed. 457;
36 *Cyc.* 1165 (and cases cited).

In any event, refusal to extend the rule of the *Settle Case,* as a rule of interpretation of the Act, so as to control rates applied to transportation performed in part in Mexico, does not defeat the central purpose of the Act. It simply recognizes the statute's self-expressed limitations. Both the international rate, and the domestic rate from the boundary, were equally known and available to petitioner, for both were published in tariffs open to the public. If, for any reason, it was thought that the international rate was improper, and its avoidance desirable, petitioner could readily have caused the shipments to be billed from Navojoa to the boundary line at the local rate of the Mexican carrier, and thence rebilled to their United States destination at the applicable domestic rate. If the latter was thought legally objectionable, petitioner had the right to complain to the Commission, and upon a proper showing could be awarded reparation for its assessment.

We may emphasize again that petitioner did not allege, either before the Commission or subsequently in the trial court, that the local rate from the boundary line to San Francisco was unreasonable or otherwise unlawful. It did not even mention that rate in either of its complaints. That local rate was not only not alleged or proved to be unreasonable; the trial court directly found that it was reasonable and lawful for application upon shipments of petitioner's commodity (R., 42). That finding has not been assailed by petitioner at any stage of this case. A corresponding statement is found in the opinion of the Appellate Court (R., 50, 51), which is likewise not attacked by petitioner.

The conclusion necessarily follows that the respondent complied with its duty under the Act, is defined by this Court in the *News Syndicate Case,* in that it maintained a lawful and reasonable rate applicable to that part of the transportation service here involved which took place within the United States; that therefore no violation of law resulted from the charging of the international through rate, and no basis exists for the exercise of jurisdiction by the Commission.

3. RESPONDENT, HAVING COMPLIED WITH ITS DUTY UNDER THE ACT TO MAINTAIN A REASONABLE RATE APPLICABLE TO THE TRANSPORTATION SERVICE PERFORMED WITHIN THE UNITED STATES, COMMITTED NO VIOLATION IN COLLECTING CHARGES BASED UPON THE INTERNATIONAL THROUGH RATE.

At page 10 of its brief petitioner repeats the assertion, made in its opening statement, that the through charge applied and collected for the transportation service from Navojoa to San Francisco is "admitted to have been unreasonable". This assertion is erroneous, for no such admission has been made. On the contrary, respondent contends, and has consistently contended, that that rate was not unreasonable, either in fact or as a matter of law.

Under Section 1(5) of the Interstate Commerce Act all charges are required to be reasonable; but before it can be determined whether, legally speaking, a particular rate is reasonable as required by that provision, it must first be brought within the scope of the Act. Since the rate here in question is not required by the Act to be published, and is not, by the very terms of the statute, within the scope of the Act, it cannot in a legal sense have been unreasonable. An act cannot be characterized as in violation of a law, unless it is first shown that it is within the terms of that law. Compare:

A. T. & S. F. Ry. Co. v. Ariz. Grocery Co. (U. S. C. C. A., 9th, Mar. 23, 1931), ... F. (2d) .....

It is of no moment that petitioner's allegation of unreasonableness, contained in its complaint in the trial court, was not directly traversed. This is not a common-law suit for damages, wherein such issue could be litigated,* but a special statutory suit to enforce the award of the Commission. Respondent denied in its answer that the Commission possessed any jurisdiction in the premises (R., 9, 10), thereby in legal effect denying that the international rate was subject to the terms of the Act. It thus properly raised the issue whether that rate was, *as a matter of law,* unreasonable.

Petitioner's entire argument in this connection (Brief, pp. 10-11, 13-14), is directed to the proposition that the respondent violated Section 1 of the Act by failing to *charge* a reasonable rate for the transportation within the United States of the shipments in question. This contention is unsound, not only in that it depends upon the essential but fallacious premise that the through rate was unreasonable in a legal sense, but also because it assumes that it has been demonstrated, and that the Commission has found, that an unreasonable charge was made for the domestic transportation service performed. Neither of these premises can be sustained. We have already demonstrated that the first is erroneous; that since the Act did not extend to the entire transportation service, and did not cover the joint through rate, the latter could not

*It may be pertinent here to observe that the defendant contested the case on the merits before the Commission, after its motion to dismiss was denied (R., 3-5).

in a legal sense be in violation of the Act and therefore unreasonable. However, the second premise is equally without foundation. The Commission did not undertake to determine or find whether a reasonable charge had been made for the service rendered within the United States. There was neither allegation, proof, nor finding that petitioner had been charged an unreasonable amount for the service from the international boundary line (at Nogales, Ariz.) to San Francisco. In fact, the record completely fails to show what charge was made for that service, and no finding has ever been made with respect thereto, either by the trial court or by the Commission.

The record does, however, show and the trial court found (R., 41-42) that the respondent maintained, and held out to the shippers the opportunity to use, a reasonable local rate from the boundary. It thus fulfilled completely the duty laid upon it by the Act, as construed by this Court in the *News Syndicate Case*. The shippers elected not to accept that opportunity, although they might readily have avoided the asserted damage of which petitioner afterwards complained; they elected instead to have the shipments transported under the international through rate. If any damage was caused by the assessment of the latter, it was due entirely to the shippers' voluntary choice, and not to any failure by respondent to comply with its obligations under the Act.

Petitioner asserts, however (Brief, p. 10) that when a carrier has collected a rate which covers a service subject to the Act, there must be some practicable

method of determining whether that rate is reasonable. That general statement is no doubt substantially correct, but it cannot be applied in this case in the manner proposed by petitioner. At the risk of seeming repetition, we may emphasize again that petitioner did not allege, in either of its complaints, that it had been subjected to an unreasonable rate or charge for any service rendered which was controlled by and subject *in its entirety* to the Act. Petitioner attacked the through rate, as a whole, and made no complaint against the charge, if any, collected for and appertaining to the service performed within the United States. It likewise made no complaint against the rate from the boundary line to San Francisco.

Petitioner contends that the Commission must necessarily inquire into and determine the propriety of the joint through rate in its entirety; and this despite the fact that the Commission admittedly has no authority to require its publication in the first instance, or to oblige carriers parties thereto to continue it in effect. The practical difficulties, if the petitioner's proposition were followed, would be such as to nullify any effective exercise of jurisdiction by the Commission. If the Commission were permitted to inquire into and determine the reasonableness, as a matter of law, of international joint through rates, it would be necessary for it to consider transportation, traffic, and operating conditions, rate-comparisons, revenue statistics, and a multitude of other details appertaining to foreign carriers not subject to the provisions of the Act, or to

the jurisdiction of the Commission. Nor is there any economic or practical reason why any distinction should exist, as between shipments moving by rail and water from interior points in non-adjacent foreign countries to points in the interior of the United States,* and those moving by all-rail routes from interior points in Canada or Mexico to interior points in the United States. If jurisdiction resides in the Commission to consider the reasonableness of transportation charges for the one, it should equally extend to the other. The Court will appreciate the impractical and, in fact, impossible burdens which would be placed upon United States carriers, endeavoring to justify the reasonableness of all international joint through rates in which they might participate. Moreover the Commission, if it were to exercise such jurisdiction, would be required to extend its investigation far beyond the territorial limits of the United States, and to invade the sovereignty of friendly foreign nations, in order to be properly informed; for otherwise the Commission would necessarily have to proceed in the absence of proper information, and upon the basis of pure assumption.

Of course, the method of obviating these practical difficulties is fully indicated by this Court's decision in the *News Syndicate Case,* considered in the light of the statute as it now reads. The carrier's obligation under the Act is to maintain reasonable and

*Cf. *Boston Wool Trade Assn. v. A. T. & S. F. R. Co.* (1923), 83 I. C. C. 445.

lawful rates applicable to the transportation services performed within the United States, and to make reasonable and lawful charges for those services. If it fails to comply with that duty, then it may properly be held liable for any damages which result from that failure. But if it fulfills that obligation (and it is directly established, in this proceeding, that respondent has done so), then there is no violation to which the Commission's jurisdiction can attach, and consequently no legal damages can have been incurred which are susceptible of recognition by the Commission.

Petitioner would have the Court believe that the collection by a United States carrier of an international joint through rate would completely prevent the Commission from determining whether the charge made for the service rendered within the United States was reasonable. Somewhat similar arguments are offered by amicus curiae (Brief, pp. 26-27, 35-38). These contentions are as unsound as they are illogical. If such a joint through rate is applied, nothing exists to prohibit the shipper from complaining that the carrier has not maintained a proper and lawful rate, applicable to the service performed within the United States, and adducing proof to support that allegation. Necessarily, if the complaint is sustained, a violation of the Act will be established, and the shipper will be entitled to recover whatever damages are due. Under such circumstances, the Commission's jurisdiction under the Act, as interpreted

and applied in the *News Syndicate Case,* would not be diminished to the slightest degree.

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4. VARIOUS DECISIONS OF THE INTERSTATE COMMERCE COMMISSION CITED AND RELIED UPON BY PETITIONER AND AMICUS CURIAE ARE OF NO VALUE AS PRECEDENTS SUPPORTING THE EXERCISE OF THE JURISDICTION HERE ASSERTED.

At pages 12 and following of petitioner's brief, and pages 31 to 33 of the brief of Amicus Curiae, reference is made to various decisions of the Commission in which it has undertaken to award reparation for the collection of joint through international rates. It is asserted that the decision of the lower court denies to the Commission a jurisdiction which it has regularly exercised and asserted for more than twenty years. Four of the cases cited are said to have been decided subsequently to the *News Syndicate Case.*

It is obvious that the cases referred to which were decided prior to the *News Syndicate Case* are of no value as precedents, for they possess no more authoritative weight than the decision upon which the petitioner's suit is based. Moreover, it will be observed that many of them arose prior to 1920, at which time, as above stated, the Act was specifically amended so as to restrict its scope to that part of the transportation of international shipments to and from adjacent foreign countries which takes place within the United States.

It may be noted, moreover, that the Commission's decisions in this respect have neither been uniform nor unanimous, and that while the Commission from time to time has exercised this disputed jurisdiction, its express and primary purpose in so doing has been to obtain a final and authoritative ruling from the courts, defining the extent of its powers. Conflicting decisions have been rendered, and in many of the cases in which jurisdiction has been asserted, vigorous dissenting opinions have been registered. In at least one case cited by our opponents (*International Nickel Co. v. Director General,* 66 I. C. C. 627), it was expressly stated that the Commission desired that the matter be carried to the courts, in order that it might obtain proper guidance in future proceedings. In any event, however, extended discussion of these cases is unnecessary, for the controlling principles which apply have been fully laid down in the *News Syndicate Case,* and their applicability cannot be avoided by the multiplication of citations from the Commission's reports.

In certain of the decisions rendered subsequent to the *News Syndicate Case,* to which reference is made, the Commission has held that it may award reparation against international rates, regardless of the maintenance of rates applicable to the transportation service performed within the United States; and it has even undertaken to assert that that conclusion is based upon the principles laid down in the *News Syndicate Case.* Extended discussion of those decisions is like-

wise unnecessary. To the extent that the Commission has attempted to award reparation against alleged unreasonable international joint rates, regardless of the maintenance of rates applying to the domestic transportation service, the decisions are erroneous, and in direct conflict with the essential principle of the controlling decision of this Court. While the Commission's persistence in an erroneous construction and application of the Act, after it has been fully interpreted by this Court, may be somewhat surprising, it cannot prevail in opposition to the definite pronouncement of this Court, or be given weight as an authoritative interpretation of the statute.

> *U. S. v. Mo. Pac. R. Co.* (1929), 278 U. S. 269; 78 L. ed. 322 (and note the exhaustive annotation upon the topic of administrative construction of statutes, which accompanies the report of this case in Lawyers' Edition).

The inconsistency of the Commission's position that it may award reparation against international rates, although it expressly disclaims any power to require such rates to be published for future application or to prevent United States lines from withdrawing from participation therein, is particularly worthy of note. As this Court has indicated, there is no essential distinction, in legal or practical effect, between an order of the Commission awarding reparation for the past, and an order prescribing a reduced rate for the future. An order for the payment of reparation is

simply a retroactive prescription of the rate in question:

N. Y. C. R. R. Co. v. N. Y. & P. R. Co. (1926), 271 U. S. 124; 70 L. ed. 865;

and the findings inure to the benefit, not merely of the shipper directly concerned, but of the entire shipping public.

Phillips v. Grand Trunk Ry. Co. (1915), 236 U. S. 662, 665; 59 L. ed. 774;
Mitchell Coal Co. v. Pa. R. R. Co. (1913), 230 U. S. 247, 258; 57 L. ed. 1472.

If the Commission is empowered to award reparation for the charging, in the past, of an international joint through rate, where it affirmatively appears that the carrier has complied with its full duty under the Act, the Commission will be enabled to accomplish, *by indirection,* that which admittedly it cannot directly accomplish, thus violating the principle that an act which is directly prohibited is likewise prohibited to be done indirectly. *Quando aliquid prohibetur ex directo, prohibetur et per obliquum.*

Minn. Rate Cases (1912), 230 U. S. 352, 421; 57 L. ed. 1511, 1550;
N. Y. C. R. R. Co. v. N. Y. & P. R. Co., supra;
51 *Corpus Juris,* p. 114, Notes 55 and 56.

It is obnoxious to this essential principle, and indeed odious to every established idea of essential justice, that the Commission should be permitted to

exercise jurisdiction *indirectly* over the volume of international through rates, by means of successive reparation awards against the United States carriers only, although it is conceded both by the Commission and petitioner that the Commission lacks jurisdiction to accomplish such reductions prospectively, by mandatory rate-orders operating for the future only.

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5. AFFIRMANCE OF THE DECISION HERE UNDER REVIEW WILL NOT HAMPER THE EXERCISE BY THE INTERSTATE COMMERCE COMMISSION OF THE JURISDICTION, CONFERRED UPON IT BY LAW, TO CONTROL RATES AND CHARGES OF UNITED STATES CARRIERS PARTICIPATING IN TRAFFIC MOVING TO OR FROM ADJACENT FOREIGN COUNTRIES.

In the concluding subdivision of its brief (pp. 14-19), petitioner repeats the substance of the argument found at pages 13 to 16 of the brief submitted in support of its petition for a writ of certiorari, asserting that the decision of the Court below, if sustained, will operate to prevent the Commission from exercising any effective control over international through rates applied upon traffic to and from adjacent foreign countries. Various illustrations are offered which, so it is said, indicate the results which would follow. A similar contention is also advanced in the brief of Amicus Curiae (p. 27). Each of the illustrations cited by petitioner, and indeed, the entire argument of our opponents in this behalf, depends upon the er-

roneous view that the decision of the lower court declares that an international joint through rate is entirely free from the requirements of Section 1 (5) of the Act, and the conclusion, which petitioner draws from that erroneous assumption, that if that portion of the Act is not controlling, other sections are likewise without application.

The lower court did not reach the conclusion attributed to it by petitioner. It only declared that an international through rate is not within the requirements of the Act, when it affirmatively appears that the United States carrier, party thereto, has complied with its full duty under the Act, by publishing and maintaining a reasonable and otherwise lawful rate applicable to that part of the transportation service performed within the United States. The portion of the statute to which petitioner refers requires that all charges for services performed *which are subject to the Act* shall be just and reasonable; and, as the record in this case shows and the trial and lower appellate courts have directly found, that requirement has been complied with. Under the decision of this court in the *News Syndicate Case,* jurisdiction to consider whether the international rate was unreasonable could be exercised, *for the purpose of ascertaining damages,* only if it were first proved that the United States carrier had failed to comply with its duty under the Act, by publishing and maintaining a reasonable rate for the transportation within the United States. The

decision of the lower court simply declares, in effect, that since that obligation has been met in the instant case, the international through rate was not subject to review and retroactive reduction by the Commission.

Since all of the argument of our opponents in this connection depends upon this erroneous interpretation of the decision of the lower court, it is unnecessary to refer specifically to the various illustrations cited in petitioner's brief. However, we may again point out that the question here involved does not relate to the control which Congress *may* exercise, under its constitutional powers to regulate international commerce, but to the jurisdiction actually conferred upon the Commission by the Act.* That jurisdiction is

*Not *all* transportation services to and from adjacent foreign countries are subject to the Act, and to the Commission's jurisdiction. For example, the Commission has no jurisdiction whatever over commerce moving from a foreign country, via rail lines through the United States, to a foreign country:

Seymour v. M. L. & T. R. & S. Co. (1915), 35 I. C. C. 492;

Canales v. G. H. & S. A. Ry. Co. (1916), 37 I. C. C. 573;

Fernandez v. S. P. R. R. Co. of Mexico (1925), 104 I. C. C. 93.

Equally it has no jurisdiction with respect to the contract of carriage of a shipment from a non-adjacent foreign country to an inland point in the United States, up to the time the United States carrier receives the shipment:

Boston Wool Trade Assn. v. A. T. & S. F. R. Co. (1923), 83 I. C. C. 445.

limited by the express terms of the Act to the transportation service performed *within* the United States. If the failure of Congress to confer upon the Commission power to reach beyond the boundary of the United States, into the territory of an adjacent foreign country, results in impairing the effectiveness of its control over international commerce, that is a defect inherent in the statute itself. In other words, the entire argument in this connection is addressed, not to the correctness of the conclusions of this Court in the *News Syndicate Case,* and of the lower court in the instant case, regarding the meaning to be given to the statutory limitation, but entirely to the propriety of the enactment itself.

However, we do not anticipate any of the dire results which seem to frighten our opponents. The Commission's control over the participation of United States carriers in international commerce, under the circumstances suggested in petitioner's illustrations, can be just as effectively exercised, in every instance, if the carriers are required to publish and maintain rates and charges for the transportation service performed within the United States which conform to the requirements of the Act, and to hold out to interested shippers an opportunity to have such rates and charges applied. If, in addition, they publish and file, in conjunction with carriers operating beyond the boundaries, joint through rates and charges which are printed and made public *as a matter of convenience,* surely no harmful results can follow. In every

instance such participation must be subject to their duty, as defined by this Court in the *News Syndicate Case,* to maintain lawful rates applicable to that part of the transportation service which takes place within the United States, and to assess and collect reasonable and otherwise lawful charges for that service.

It must also be obvious that if the Commission is permitted to exercise extra-territorial powers, in the manner asserted by our opponents, without regard to the maintenance of lawful rates for the transportation within the United States, the inevitable tendency will be that United States carriers will withdraw from participation in and publication of international joint through rates, now published as a matter of convenience and for the information of interested shippers. Shippers and receivers of international traffic to or from adjacent foreign countries will thus be obliged to use combinations on the boundary lines, and will be without any reliable information, provided in tariffs of United States carriers, respecting the rates and charges applying to their shipments for the movement between the boundary line and the foreign origins or destinations.

Since petitioner has resorted to various illustrations for the purpose of indicating results which in its opinion may follow if the decision under review is sustained, we may be permitted to offer a corresponding illustration, showing the possibilities which might eventuate if the decision were reversed. As may be

seen by reference to a railroad map of the Dominion of Canada, a continuous line of railway extends from Halifax, Nova Scotia, via Quebec, Montreal, and Toronto, to Windsor, Ontario, and thence to Detroit. Suppose, for purposes of illustration, that a through rate of $2.00 per hundred pounds is published, from Halifax to Windsor, to which is added, for movement to Detroit, a local rate from the boundary line at Windsor of 5 cents per hundred pounds. For convenience, the carriers decide to eliminate the combination of the separately-named factors over the boundary, and to name an equivalent through one-figure rate of $2.05, out of which each carrier retains, as its proportion, the same amount as when the combination was in effect: i. e., $2.00 to the Canadian lines, and 5 cents to the United States carrier. If petitioner's theory of the Commission's jurisdiction is sustained, the Commission would be permitted to determine the reasonableness of the entire international through rate, regardless of the reasonableness of the local rate applying from the international boundary line to the point of delivery within the switching limits of Detroit, and to order the United States carrier to pay the entire amount of whatever reparation might be found due under that determination. Let us suppose the Commission undertakes to declare the through rate unreasonable, to the extent it exceeds $1.50, and to award damages equal to the difference. Such damages, assuming a carloading of 20 tons, would amount to $220.00 per car, all of which would be assessed against

the United States carrier, notwithstanding that its entire revenue, upon the basis of the assumed loading, would amount to only $20.00 per car. While the illustration is possibly extreme, it is not in any sense exaggerated or improbable. It demonstrates the essential injustice which could be accomplished, if the argument of our opponents were accepted.

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6. THE TRANSPORTATION OF PETITIONER'S SHIPMENTS WAS PERFORMED PURSUANT TO CONTRACTS ENTERED INTO BETWEEN THE MEXICAN CARRIER AND THE CONSIGNORS, WHICH CONTRACTS ARE BINDING UPON PETITIONER.

In our opening statement we have emphasized the fact that the transportation service accorded to petitioner's shipments was covered by shipping contracts duly entered into between the Mexican carrier and the shippers, evidenced by the bills of lading which were issued at the times and at the place the transportation commenced. These bills of lading are incorporated bodily in the record, as Exhibits A, C and D to respondent's answer to the complaint in the lower court, and are accompanied by the English translations (R. 10(a)-33). Each of these contracts specifically provides that the transportation service is subject to the (Mexican) classification and tariffs in force at the date of its issuance, and that all transportation service shall be subject to the laws and railway regulations, and to all the conditions provided in the docu-

ment (R. 11-19-27). Both by their terms, and by well-established principles of the law of contracts, these shipping contracts, which were duly executed in Mexico and in accordance with Mexican law, are to be interpreted according to the law of time and the place of contracting; and this is true even though they contemplated that delivery of the freight should be in another state or country.

Liverpool, etc. Co. v. Phoenix Ins. Co. (1889), 129 U. S. 397, 458; 32 L. ed. 788, 798;
Northern Pac. Ry. Co. v. Wall (1916), 241 U. S. 87, 91; 60 L. ed. 905, 907.

It is fully established, and definitely found as a fact by the trial court (R. 40), that the international through rate of $1.33, applied upon these shipments, was duly published in a tariff on file with the Department of Communications and Public Works of Mexico; and it is not disputed that that tariff was in effect at the times of the transportation services commenced. The contracts thus expressly provide that the freight charges due thereunder were to be computed according to the tariffs in effect upon the dates they were signed: i. e., the amount of the shippers' (or consignee's) liability for freight was to be determined with respect to the contemporaneously published rate of $1.33.

Although the petitioner was not directly a party to these contracts between the Mexican carrier and the shippers, it was named therein as consignee, and it

actually received the shipments upon their arrival at destination, and paid the charges thereon. By the express terms of the contracts (Clause 16: R., 16, 24, 32), petitioner, as consignee, by its acceptance of the freight, became liable for the full amount of the freight charges. As a party for whose benefit the contracts were made, the petitioner, by accepting their benefits, likewise became subject to their burdens, if by their terms they purported to impose any such burdens. This Court has repeatedly held that the acceptance, by a consignee, of goods transported under a shipping contract of this character obligates the consignee to pay the applicable freight charges in full.

L. & N. R. Co. v. U. S. (1925), 267 U. S. 395, 397; 69 L. ed. 678, 680;

L. & N. R. Co. v. Central Iron Co. (1924), 265 U. S. 59, 70; 68 L. ed. 900;

P. C. C. & St. L. R. Co. v. Fink (1919), 250 U. S. 557; 63 L. ed. 1151.

These contracts were not void, or subject to abrogation or modification by the Commission, because of any supposed inconsistency with the Interstate Commerce Act. The Commission, acting in accordance with the powers conferred by the Act, may abrogate, supplant, or modify transportation contracts between shippers and carriers only when they cover transportation services, or other subject matter, coming within the scope of the Act itself. As we have previously shown at length, the transportation service here in-

volved was not subject to the Act or to any jurisdiction of the Commission, except to the extent that it took place within the United States. It is hardly open to argument that the Commission, in undertaking to award reparation amounting to the difference between the charges assessed at the rate specified in the shipping contracts, and those which would have accrued under a rate retroactively deemed to have been reasonable, has in practical effect attempted to substitute the latter rate as the measure of the petitioner's contractual liability, and thus to abrogate, or at least to modify, one of the essential features of the contracts. It has undertaken to make this modification effective as to the entire transportation service, including that performed in Mexico as well as within the United States. It has not, however, undertaken to exercise any jurisdiction, either to abrogate or modify these contracts, insofar as they govern transportation services performed wholly within the United States. We may emphasize again that petitioner made no allegation or proof, either before the Commission or in Court, respecting the transportation service performed *within* the United States. The Commission made no findings in that regard, and did not attempt to limit the effect of its decision and order to that part of the transportation service. In short, if it be conceded—which it is not—that the Commission might modify these contracts, upon allegation and proof that any of the provisions thereof were inconsistent with or forbidden by the Act, it nevertheless

affirmatively appears that such action has not been called for by petitioner, nor attempted by the Commission.

These contracts may not be ignored unless they are illegal, as to which there is neither allegation or proof. On the contrary, they were valid and binding upon petitioner, and imposed a definite obligation. That obligation could not be varied or abrogated by the Commission, in the manner attempted by its order here involved, and the order is therefore invalid and unenforceable.

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7. FURTHER REPLY TO CERTAIN CONTENTIONS ADVANCED IN BRIEF OF AMICUS CURIAE.

The brief of Amicus Curiae undertakes to support generally the contentions of the petitioner, and is, in large measure, simply a paraphrase of petitioner's arguments. To a considerable extent, therefore, it demands no separate reply. However, certain contentions are advanced by amicus curiae indicating that its position upon the major issues differs somewhat from that of petitioner, and it will be our purpose to treat briefly therewith, in the discussion which follows.

Amicus Curiae asserts (Brief, pp. 14, 15) that in the proceeding before the Commission that tribunal did not decide, and was not called upon to decide, whether the domestic rate from Nogales to San Fran-

cisco was reasonable, because (a) that question was not at issue, and (b) the issue before the Commission was whether the charges collected under the joint through rate were unjust and unreasonable, and whether the petitioner was damaged. This assertion simply lends emphasis to the point, which we have previously stressed, that the Commission was not called upon to and did not determine whether the charges assessed and applied upon petitioner's shipments, with respect to that part of the transportation service which was within the United States, and thus within the Commission's jurisdiction under the Act, were unjust and unreasonable; and that no allegation, proof, or finding has even been made with respect to those charges.

At page 15 of its brief Amicus Curiae asserts that the lower court erred (1) in finding that the petitioner was not compelled by any act of the respondent to pay the joint through rate; and (2) in failing to find that the Commission had jurisdiction to determine that the joint through rate applicable to the shipments in question, was unreasonable. These two assignments of error constitute the fundamental propositions advanced by opponents. In our preceding discussion we have disposed of the first, for we have shown that the maintenance of a reasonable rate, covering that part of the transportation service performed within the United States, constituted a full compliance with the duty placed upon respondent by the Act as interpreted in the *News Syndicate Case,* and afforded to the ship-

pers an opportunity, if they had so elected, to avoid payment of the asserted unreasonable joint through rate by having their shipments transported either by rail or other means to the boundary line, and thence by rail, at the reasonable domestic rate of the respondent, from the boundary line to San Francisco. The second depends, of course, upon the establishment of the first; for obviously, as stated by this Court in the *News Syndicate Case,* unless respondent failed to comply with its duty under the Act, in such manner as to compel the petitioner to pay an unreasonable joint through rate, the Commission has no jurisdiction to consider the latter, even for purposes of awarding damages.

Amicus Curiae also says (Brief, p. 15) that the court below implied that under the Act shippers have a choice of rates, and asserts that there can be but one lawful rate applicable to particular commerce between particular points under the Act. As we have previously shown, in dealing with a substantially similar contention of petitioner, this argument simply begs the question, for it assumes that the entire transportation service here considered is subject to the Act. The Act applies, and can apply, only to that part of the service which is performed within the United States; it cannot extend beyond the boundaries of the United States into the territory of the adjacent foreign country, and compel shippers or carriers there to observe what is merely a rule of interpretation of the Act. Nor is it correct to say that the court below

implied that shippers have a choice of rates *under the Act*, i. e., within the United States. The court below made no such declaration, either express or implied. It recognized that the transportation service here considered was not, in its entirety, subject to the Act, and that consequently a rule of applicability, arising out of and founded upon the Act, is not controlling.

At page 23 of its brief, Amicus Curiae asserts that the respondent did not comply with the duty placed upon it by the Act, as interpreted in the *News Syndicate Case*, in that it did not publish or maintain a reasonable and lawful rate applicable to the transportation service, performed within the United States, of the shipments here involved. In making that contention Amicus Curiae simply challenges the direct findings, made upon undisputed evidence, by the trial court, and affirmed by the lower appellate court (R., 41-42, 47, 50). Both of those courts directly found that the respondent did publish and maintain a rate, applicable from the international boundary line to San Francisco, which was just and reasonable, and which was neither alleged, proved nor found to have been unreasonable by the Commission. As we have already pointed out repeatedly, that rate was applicable to petitioner's shipments, at its own election, and the joint through rate was applied instead, only because the shippers in Mexico chose to enter into contracts (which petitioner adopted) specifying that it should be applied (R., 39-40).

At pages 23 and following, Amicus Curiae asserts that despite the existence of a reasonable rate applicable to the transportation service within the United States, the respondent is not relieved of responsibility for failing to apply that rate, and for having applied and collected the alleged unreasonable joint through rate. This argument is predicated necessarily upon the assumption that the joint rate is subject in all respects to the jurisdiction of the Commission, regardless of the existence of the reasonable domestic rate, and that the Commission might, within its jurisdiction, determine whether the joint through rate was unreasonable. But under the decision of this Court in the *News Syndicate Case,* compliance by the carrier with its duty to publish a reasonable rate applicable to the transportation within the United States discharges its responsibility, and the Commission cannot consider whether the joint through rate is in fact unreasonable or not. Its jurisdiction can be so exercised only when it is proved, as an essential prerequisite, that a violation of the Act has been committed by the United States carrier. In short, the charging of the international through rate (whether considered unreasonable or otherwise) is not itself the tortious act to which the jurisdiction attaches; it is the failure of the United States carrier to comply with its duty under the Act which constitutes the tort, and creates the damage. The Commission's consideration of the international through rate, consequent upon proof of the tortious act, is merely for the purpose of ascertaining the damages thus occasioned.

We have already pointed out that the Commission's decision, rendered subsequent to the decision of this Court in the *News Syndicate Case,* are of no value as authorities, since they represent simply the persistent effort of the Commission to exercise jurisdiction despite the direct ruling made by this Court. These comments apply with equal force to the decision in:

Cyanamid, etc., from Niagara Falls (1929), 155 I. C. C. 488;

to which reference is made at pages 24 and 25 of the brief of Amicus Curiae. Moreover, it will be noted that in this case, as in various other cases, the opinion of the Commission was by no means unanimous, and although a majority concurred in the result, various reasons were assigned therefor, and at least two Commissioners dissented vigorously. It is of interest to note the statements made in the separate concurring opinion of Commissioner Eastman. Referring to this Court's decision in the *News Syndicate Case,* Commissioner Eastman said (155 I. C. C., at pp. 500, 501):

> "The court did not hold that we can award damages because of the unlawfulness of international rates under Section 1, which was the theory on which we had proceeded, but because of the breach of statutory duty involved in the failure to publish just and reasonable rates to or from the boundary. For this purpose we have jurisdiction to inquire, not into the lawfulness of

international rates, but into their inherent reasonableness.

"From this reasoning of the court I think that it is permissible to infer that *we are without jurisdiction over international rates as such, our only jurisdiction over international traffic being to see to it that the United States railroads publish lawful rates to or from the boundary for the portion of the transportation which is within this country, and to award damages because of any breach of this duty on their part.* Under this theory, United States railroads would be free to participate in joint international rates as they see fit, and such rates would not be subject to our tariff rules or to our regulation in any other respect. They could be used by shippers as alternatives to rates to or from the boundary, and our only jurisdiction would be to inquire into their inherent reasonableness for the purpose of ascertaining damages if shippers were compelled to pay them because of the absence of rates applicable solely to the transportation within the United States." (Emphasis ours).

At several places in its brief (pp. 26-27, 36, 37, 38) Amicus Curiae argues that affirmance of the decision of the lower court will be equivalent to a declaration that carriers subject to the Interstate Commerce Act will be relieved from the obligations imposed by the Act, by the mere form in which they elect to publish rates. Apparently it is thought that a carrier participating in international traffic may exact unreasonable rates for such transportation, and escape responsi-

bility merely by publishing a rate to or from the international boundary regardless whether that rate is actually applied. This argument depends upon the mistaken premise that the international through rate must be applied, in lieu of possible combinations on the boundary line, and that a shipper would have no alternative but to pay the supposed unreasonable international through rate. That premise is, of course, fallacious; for there is nothing in the Act to prevent a shipper, if he believes that a published international rate is unreasonable, from billing his shipments so as to avail himself of combinations upon the boundary line. If the rate applying to the transportation within the United States is unreasonable, it may be attacked by complaint to the Commission, which would have ample jurisdiction to award reparation and to prescribe a lower rate for the future. It may again be observed that, in the instant case, it has neither been alleged nor proved nor found that the charge made by the respondent for the transportation service performed within the United States, under the alleged international through rate, was not in fact reasonable and lawful in all respects.

At pages 27 to 29, and 34, of its brief, Amicus Curiae refers to the decision of this Court in

U. S. v. P. & A. R. & N. Co. (1913), 228 U. S. 87; 57 L. ed. 742,

and asserts in substance that that case sustains the exercise by the Commission of jurisdiction in the

premises, although an international transportation service is involved. An examination of the opinion indicates that it does not support the contention of Amicus Curiae. The portion of the opinion quoted at pages 28 and 29 of the brief was the court's reply to the contention there advanced that the laws of the United States could not be applied to control acts of a criminal nature, committed in conjunction with through transportation part of which was performed within the United States, since the law would thus be given extra-territorial effect in part. The court held that since the acts, if criminal, were committed in conjunction with transportation performed within the United States and thus within its jurisdiction, the United States might properly exercise control over the parties by whom the acts were done. But to apply the principle to the instant case, it must first be assumed that the respondent has committed a violation of law with respect to the international commerce here involved. That assumption is directly contrary to the established facts, and the undisputed findings of the trial and lower appellate courts; for it is here affirmatively shown that the respondent has not only not violated the law, but has complied with every requirement thereof, as laid down by this Court in its controlling decision in the *News Syndicate Case.* We may concede that if a violation were committed, upon which jurisdiction of the Commission might be predicated, such jurisdiction might be given extra-territorial effect, in that the Commission would be em-

powered to consider, *for the purpose of ascertaining damages,* whether the international through rate was unreasonable in its entirety. But such jurisdiction must depend upon a showing that the Act is violated with respect to the transportation service within the United States: a showing which is not only not made by the petitioner in the instant case, but is in fact affirmatively challenged by the direct proof made by the respondent, and the findings in response thereto made by the trial court.

Reference is made, at pages 29 to 30 of the brief, to decisions of this Court in

C. N. O. & T. P. R. R. Co. v. I. C. C. (1896), 162 U. S. 184; 40 L. ed. 935;

and

Ill. C. R. R. Co. v. I. C. C. (1907), 206 U. S. 411; 51 L. ed. 1128.

It will be observed that both of these cases involved transportation within the United States only, and that both arose prior to the amendment of the Interstate Commerce Act in 1920, whereby specific limitations were placed upon the scope of the Act as applied to transportation to and from adjacent foreign countries. Neither of these decisions can be considered as having any particular application to the case at bar.

The argument at pages 34 and 35 of the brief of Amicus Curiae is to the effect that the amendment of the Act, enacted in 1920, is of no especial significance, and creates no limitation which did not thereto-

fore exist. It is said that the Commission never had extra-territorial powers, regardless of the additional restrictive language, and is not required to exercise such powers in order to determine whether a carrier subject to the Act is liable, as a joint tort-feasor, for committing a wrong forbidden by the Act. We have already pointed out that, under the authorities, the deliberate selection of language differing from that in the preceding statute indicates that a change in the meaning and effect of the statute was intended, and that a material amendment therefore cannot properly be disregarded. Indeed, it is not at all unlikely that the amendment was enacted because of the Commission's conflicting views as to its jurisdiction over international traffic, and particularly its decisions asserting jurisdiction to award reparation against international rates, though it disclaims any power to prescribe such rates for the future. We may again emphasize, moreover, that the argument of Amicus Curiae in this connection, as indeed its entire argument throughout its brief, necessarily presupposes that the assessment and collection of an international through rate is, in and of itself, a violation of the Interstate Commerce Act, regardless of the maintenance of reasonable rates and the application of reasonable charges upon those portions of the service performed within the United States, and is thus squarely opposed to the essential principles of this Court's decision in the *News Syndicate Case.*

CONCLUSION.

The decision of the lower court is squarely in accord with the controlling pronouncement of this Court in the *News Syndicate Case*. The record demonstrates that the respondent has complied fully with the duty laid upon it by the Interstate Commerce Act, as interpreted by this Court in that opinion, and fails to show that any violation of the Act has been committed as a result of which petitioner has been damaged.

We ask the Court to approve and affirm the decision of the lower court.

Respectfully submitted,

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Dated: San Francisco, California,
April 15, 1931.

(APPENDIX FOLLOWS.)

Appendix.

Appendix.

STATUTES RELIED UPON.

Act to Regulate Commerce, Section 1, paragraph 1 (in effect prior to 1920: 36 Stat. L. 544):

"That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States, to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United

States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of trans-shipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however,* That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid.

Interstate Commerce Act, Section 1, paragraphs 1, 2 (in effect from and after 1920: 41 Stat. L. 474; 49 U. S. Code, Section 1, paragraphs 1, 2):

Sec. 1.

(1) That the provisions of this Act shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or

(c) The transmission of intelligence by wire or wireless;—

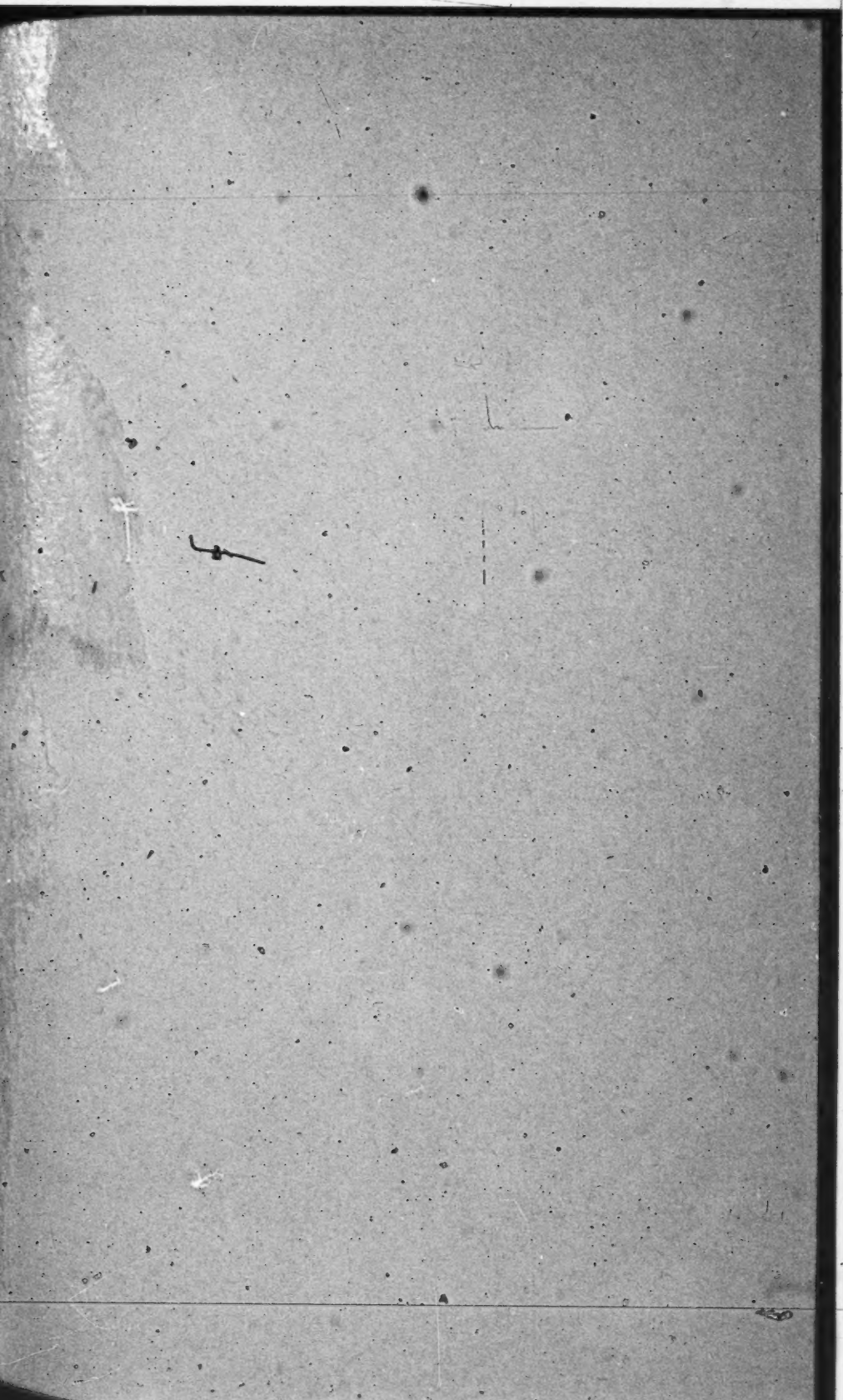
from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.

(2) The provisions of this Act shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

(b) To the transmission of intelligence by wire or wireless wholly within one State and not transmitted to or from a foreign country from or to any place in the United States as aforesaid; or

(c) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this Act except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district.



Due service and receipt of a copy of the within is hereby admitted this_____day of April, 1931.

_____

Attorney for Petitioner.

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CHARLES ELMORE CRO
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IN THE

Supreme Court of the United States

October Term, 1930.

No. 520.

LEWIS-SIMAS-JONES COMPANY,
Petitioner,

v.

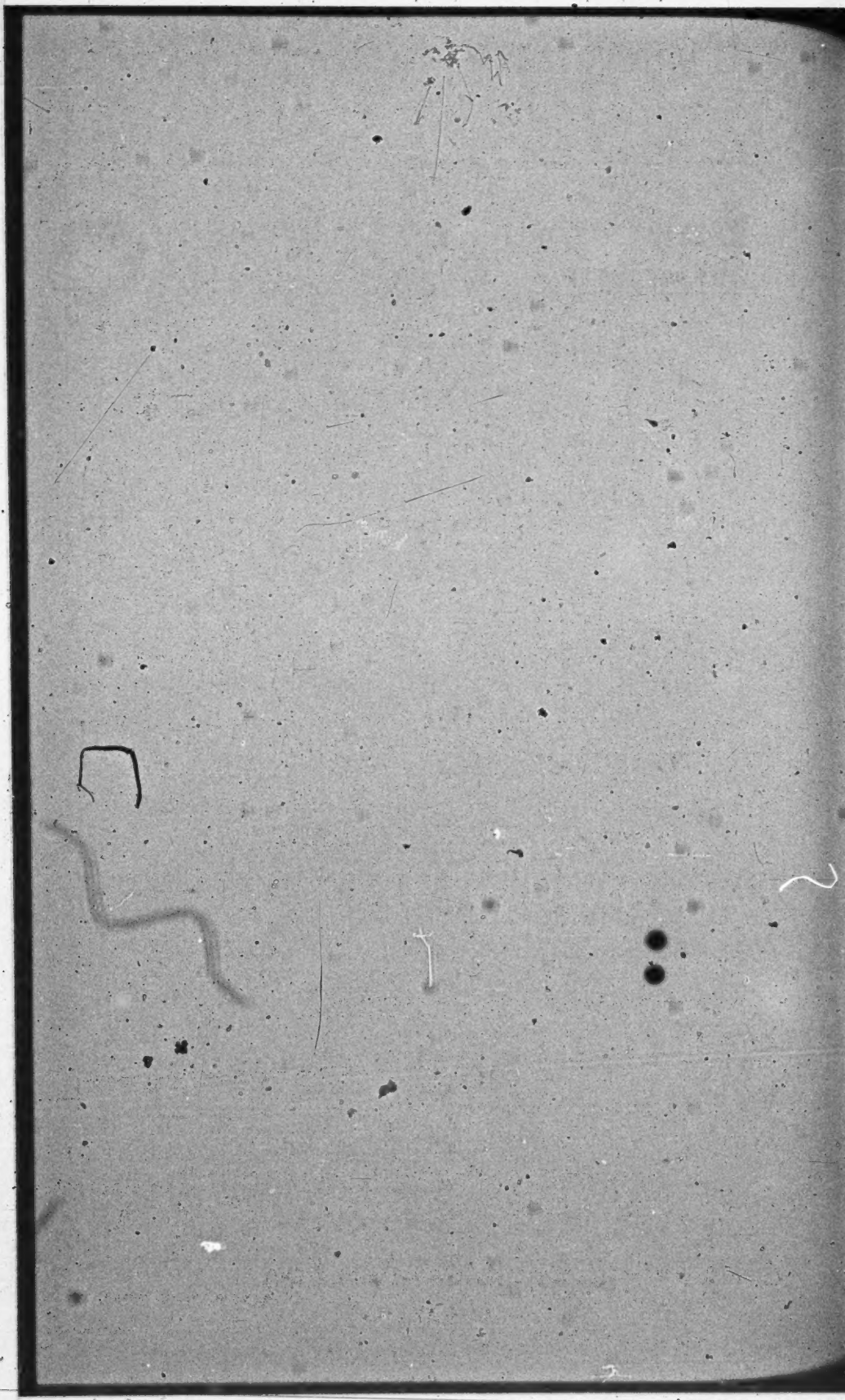
SOUTHERN PACIFIC COMPANY,
Respondent.

MOTION OF THE AMERICAN CYANAMID COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE.

ROBERT E. QUIRK,
Counsel for American Cyanamid Company, as Amicus Curiae.

March 31, 1931.

PRESS OF THE SUBWAITE CO., WASHINGTON



IN THE

Supreme Court of the United States

October Term, 1930.

No. 520.

LEWIS-SIMAS-JONES COMPANY,
Petitioner,

v.

SOUTHERN PACIFIC COMPANY,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

May it Please the Court:

The undersigned, as counsel for the American Cyanamid Company, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae.*

ROBERT E. QUIRK,
Counsel for American Cyanamid Company, as Amicus Curiae.

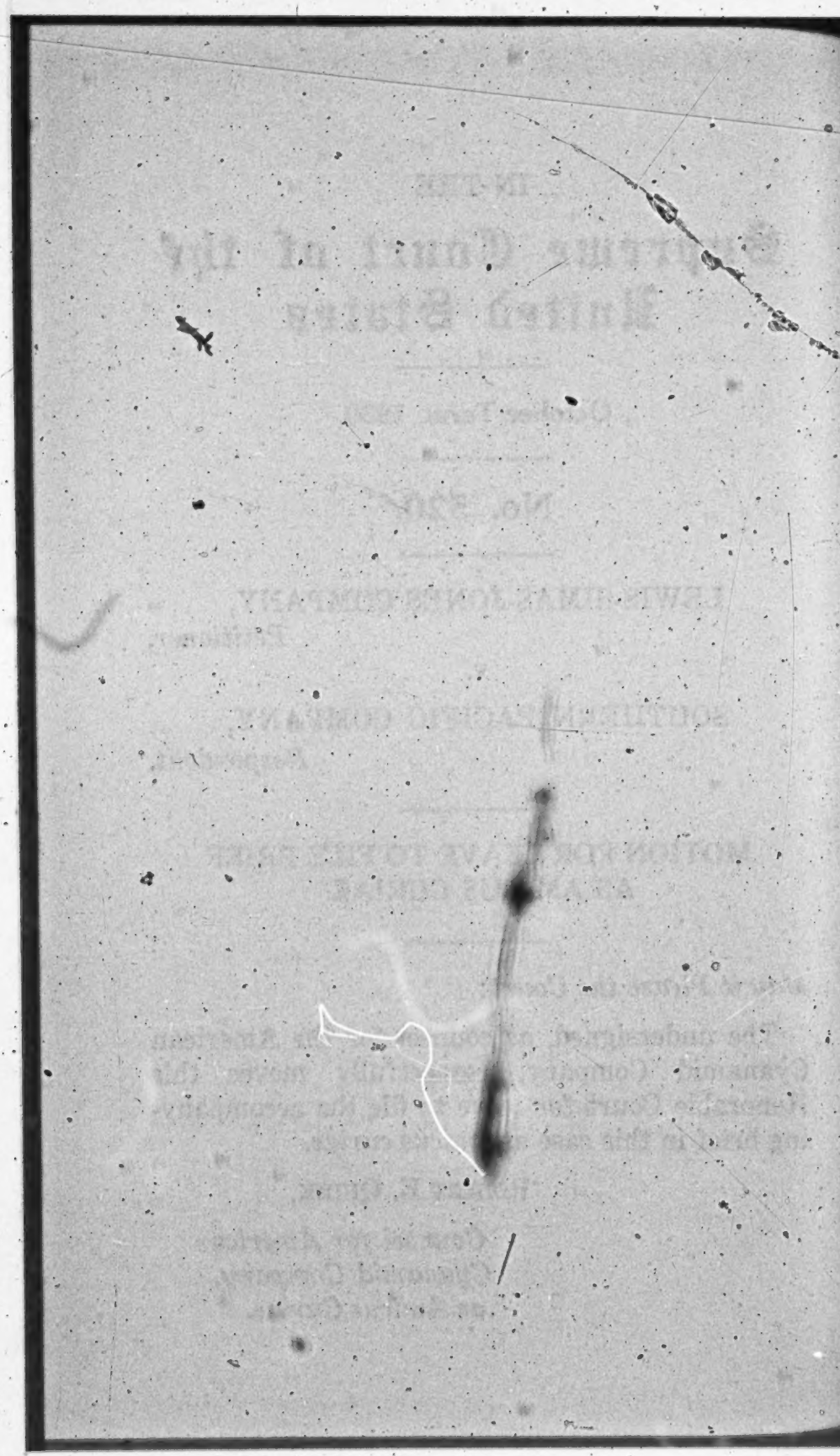


TABLE OF CONTENTS

	Page
Preliminary Statement	7
Statement of the Case	8
Argument	12
Summary of Argument	12
Statutes Relied Upon	13
Point 1. The decision of the court below is contrary to and in conflict with the applicable statutes as well as the decision of this Court in *News Syndicate Co. v. New York Central*, 275 U. S. 179	13
Point 2. The decision of the court below is contrary to and in conflict with the interpretation of the Interstate Commerce Act as applied by the Interstate Commerce Commission in numerous cases over a period of more than twenty years	31
Point 3. The jurisdiction of the Interstate Commerce Commission over the subject matter is clear and the construction of the statute as applied by the Commission in this instance is correct and in accordance with the construction placed upon the statute by the Commission, which this Court upheld in *News Syndicate Co. v. N. Y. C.*, 275 U. S. 179	34
Conclusion	39

TABLE OF CASES

	Page
American Cyanamid Co. v. Dir. Gen., 69 I. C. C. 337	32
American Cyanamid Co. v. Michigan Central, 51 I. C. C. 236	32
Armour & Co. v. United States, 209 U. S. 56	29
Atlantic Fish Co. v. C. N. R., 148 I. C. C. 533	14, 32
Baer Bros v. Denver & R. G. R. R. Co., 233 U. S. 479	22
Baltimore & O. S. W. R. Co. v. Settle, 260 U. S. 166	14
Black Horse Tobacco Co. v. I. C. R. R., 17 I. C. C. 588	31
Bloedel-Donovan v. Dir. Gen., 68 I. C. C. 95	32
Brown Paper Mills Co. v. Inland Waterways Corp., 156 I. C. C. 339	14
C., N. O. & T. P. R. R. Co. v. Interstate Commerce Commission, 162 U. S. 184	29, 30
Commercial Club of Omaha v. B. & O., 52 I. C. C. 225	32
Cyanamid & Cyanide from Niagara Falls, 155 I. C. C. 488	24, 32
Grassell Chemical Co. v. B. & O., 89 I. C. C. 383	32
Illinois Central R. R. Co. v. Interstate Com. Com., 206 U. S. 441	30
International Nickel Co. v. Dir. Gen., 66, I. C. C. 627	22, 32
Justice Co. v. Holton I. R. Co., 153 I. C. C. 673	14, 32
Kanotex Refining Co. v. A. T. & S. F. Ry. Co., 46 I. C. C. 495	14
Lake Superior Paper Co. v. Dir. Gen., 61 I. C. C. 709	32
Logan v. Davis, 233 U. S. 613	32
Louisville & Nashville R. R. Co. v. Sloss-Sheffield Steel & Iron Co., 295 Fed. 53, 269 U. S. 217	22
Minnesota and Ontario Paper Co. v. N. P. Rwy., 66 I. C. C. 571	32

TABLE OF CASES (Continued)

Page.

Monarch Paper Co. v. Can. Pac., 53 I. C. C. 620 32

News Syndicate Co. v. N. Y. C., 275 U. S. 179..8, 12, 13, 17, 34

Ontario Paper Co. v. C. N. Rys., 95 I. C. C. 66..... 32

Republic Coal Co. v. C. St. P. M. & O. Ry. Co., 85 I. C. C. 331 14

San Diego Oil Products Corp. v. Holton I. R. Co., 164 I. C. C. 505 32

Southern Pacific Co. v. Darnell-Taenzer Co., 245 U. S. 531 22

Spanish River Pulp & Paper Mills v. A. & W. Rwy. Co., 113 I. C. C. 343 32

Tennessee Extract Corp. v. L. & N. R. R. Co., 128 I. C. C. 709 31

Texas & Pacific Rwy. Co. v. Abilene Cotton Oil Co., 204 U. S. 426 14

Transfer of Passengers through New York and Newark, 165 I. C. C. 497 14

United States v. Missouri Pacific R. R. Co., 278 U. S. 269 32

United States v. Pacific & A. R. & N. Co., 228 U. S. 87 ..... 27, 34

IN THE

Supreme Court of the United States

October Term, 1930.

No. 520.

LEWIS-SIMAS-JONES COMPANY,
Petitioner,

v.

SOUTHERN PACIFIC COMPANY,
Respondent.

BRIEF OF AMERICAN CYANAMID COMPANY AS AMICUS CURIAE.

PRELIMINARY STATEMENT.

The American Cyanamid Company, a corporation of the State of Maine, owns and operates a plant at Niagara Falls, Ont., about one mile from the international border at which it manufactures cyanamid and crude cyanide which are marketed

chiefly in the United States and are shipped to points within the United States on joint rates concurred in by railroads within Canada and railroads within the United States. Most of the raw products used by the American Cyanamid Company are shipped from points within the United States. This company is not directly interested in the rates and charges which are the subject matter of this suit, but it has a vital and continuing interest in the principle of law involved.

The decision of the District Court of Appeals of California in the case at bar, reported in 289 Pac. 643, by an erroneous construction of the statute and of the decision of this Court in *News Syndicate Co. v. N. Y. C.*, 275 U. S. 179, reversed an order of the Interstate Commerce Commission which was based upon an interpretation of the Interstate Commerce Act applied by that Commission to numerous similar cases for more than twenty years.

STATEMENT OF THE CASE.

The petitioner filed a complaint with the Interstate Commerce Commission against the Southern Pacific Company, the respondent, in which it assailed as unreasonable in violation of the Interstate Commerce Act the rates and charges exacted by the respondent upon carload shipments of cow peas which moved from Navojoa, Mexico, in conjunction with the Southern Pacific Railroad

Company of Mexico, and the respondent, through Nogales, Ariz., the border point, to San Francisco, Calif., as through shipments on through bills of lading issued by the initial carrier at Navojoa, Mexico. The respondent and the Southern Pacific Railroad Company of Mexico maintained a joint through rate of $1.33 per 100 pounds, which was filed and published with the Interstate Commerce Commission. The respondent exacted charges from petitioner on the basis of that rate.

The complaint alleged that the rate of $1.33 per 100 pounds was unjust and unreasonable to the extent it exceeded 94 cents per 100 pounds. The Commission found that the charges collected on the basis of the rate of $1.33 were unjust and unreasonable to the extent they exceeded the charges that would have been applicable at the rate of 94 cents per 100 pounds and awarded damages in a sum equal to the difference in the charges collected and the charges that would have been collected at the reasonable rate. Respondent declined to pay the award. Whereupon petitioner filed a suit against respondent in the Superior Court of the City and County of San Francisco under authority of Section 16 (2) of the Interstate Commerce Act, 41 Stat. L. 491, to recover on the award made by the Commission.

In the proceeding before the Commission respondent moved to dismiss the complaint upon the ground that the Commission was without juris-

dition, which motion was denied by the Commission.

In the trial court respondent did not deny the allegations of facts set up by petitioner but it did renew its plea that the Commission was without jurisdiction to make the order sued upon. The only fact pleaded by respondent which now appears to be material, is the allegation in its amendment to the answer (R. 5, 6) that respondent

> "maintained a rate applicable on cow peas, carloads, from the said international boundary line at Nogales, Ariz., to San Francisco, Calif., which rate would have been applicable for the transportation within the United States of the shipments mentioned in the complaint had the consignors or owners elected to consign the same to said international boundary line and had thence reshipped said cow peas from said international boundary line to San Francisco; and that the Interstate Commerce Commission has not at any time found said local rate from the international boundary at Nogales, Ariz., to San Francisco, Calif., to be or to have been unjust or unreasonable, or otherwise in violation of law."

There was no allegation in the answer, as amended, that respondent maintained a reasonable rate or any rate applicable to the transportation as rendered within the United States of the shipments of cow peas which moved on through bills of lading as though shipments from Navojoa through the port of Nogales to San Francisco.

The trial court found that the respondent maintained and published a rate of $1.145 per 100 pounds on carload shipments of cow peas originating at Nogales, Ariz., and destined to San Francisco, Calif.; that this rate was applicable to carload shipments of cow peas originating at the point where the lines of the Southern Pacific Railroad Company of Mexico and respondent touched the international boundary line at Nogales and destined to San Francisco; that this rate was likewise applicable upon carload shipments of cow peas loaded into cars at any point upon or adjacent to the boundary line within the limits of respondent's railroad yards at Nogales, Ariz., and destined to San Francisco; that the shipments in issue could have been transported by other means than by railroad to a point at the boundary line and there loaded into cars for movement over respondent's lines; that the rate applicable on shipments from such point upon the boundary line to San Francisco was the rate of $1.145; that that rate was reasonable and lawful for application upon carload shipments of cow peas from Nogales, Ariz., to San Francisco; and that the Interstate Commerce Commission had made no finding and had no evidence before it regarding the reasonableness of the rate of $1.145. Upon these premises the trial court concluded as a matter of law that the Commission was without jurisdiction. (R. 66 to 69).

On appeal to the District Court of Appeals of California, First Appellant District, that judgment was affirmed. 289 Pac. 643. The petitioner then applied to the Supreme Court of California for a hearing in accordance with the laws of that state, which application was denied.

ARGUMENT.

Summary of Argument.

Our argument will rest mainly upon three points:

(1) The decision of the court below is contrary to and in conflict with the applicable statutes as well as the decision of this Court in *News Syndicate Co. v. N. Y. C.*, 275 U. S. 179.

(2) The decision of the court below is contrary to and in conflict with the interpretation of the Interstate Commerce Act as applied by the Interstate Commerce Commission in numerous cases over a period of more than twenty years.

(3) The jurisdiction of the Interstate Commerce Commission over the subject matter is clear and the construction of the statute as applied by the Commission in this instance is correct and in accordance with the construction placed upon the statute by the Commission, upheld in *News Syndicate Co. v. N. Y. C.*, 275 U. S. 179.

Statutes Relied Upon.

The relevant parts of the statutes relied upon are printed in the appendix to this brief.

Point 1.

The decision of the court below is contrary to and in conflict with the applicable statutes as well as the decision of this Court in *News Syndicate Co. v. N. Y. C.*, 275 U. S. 179.

The court below, after discussing the decision of this Court in the *News Syndicate case*, found:

> In the present case respondent maintained and published a rate as required by the act on shipments from the international boundary at Nogales, Arizona, to San Francisco, which rate was not found to be unreasonable by the commission. The appellant was not compelled to pay the joint through rate by reason of any violation of the act on the part of respondent. The jurisdiction of the commission to award damages must be predicated upon a violation of the act and where there is no evidence to show that there has been such violation, the commission is without jurisdiction to make an award of damages.

One of the major purposes of the Interstate Commerce Act is to establish certainty and uniformity in the application of the rates, practices and charges of common carriers subject to the

act. *Texas & Pacific Rwy. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426.

It is settled law that under the Interstate Commerce Act there can be but one lawful rate applicable to commerce subject to that Act; *Baltimore & O. S. W. R. Co. v. Settle*, 260 U. S. 166; *Charles B. Justice Co. v. Holton I. R. Co.*, 153 I. C. C. 673; *Atlantic Fish Co. v. Canadian N. Rwy.*, 148 I. C. C. 533; *Kanotex Refining Co. v. A. T. & S. F. Ry. Co.*, 146 I. C. C. 495; and that a rate once lawfully established continues to be the legal rate until legally cancelled. *Transfer of Passengers Through New York and Newark*, 165 I. C. C. 497; *Brown Paper Mills Co. v. Inland Waterways Corp.*, 156 I. C. C. 339. It is also settled that a tariff lawfully filed with the Commission, plus the statute, has the force and effect of a statute. *Republic Coal Co. v. C. St. P. M. & O. Ry. Co.*, 85 I. C. C. 331.

Petitioner's complaint before the Commission assailed the charges which respondent compelled it to pay on the through shipments as made. In that complaint it was not concerned with and did not assail rates and charges which might have been applicable and which might have been exacted by respondent had different shipments been made. The Commission did not decide and was not called upon to decide by the issues raised whether the rate from Nogales, Ariz., to San Francisco, Calif., applicable on shipments from Nogales was just and reasonable because (a) that question was

not in issue before the Commission, and (b) the issue before the Commission was whether or not the charges exacted by respondent from petitioner under the joint rate of $1.83 applicable to the transportation service rendered on the through shipments as made from Navojoa, Mexico, to San Francisco were unjust and unreasonable, and if unjust and unreasonable whether the petitioner was damaged by the tort committed by respondent.

The court below erred (1) in finding that the petitioner was not compelled to pay the joint through rate (because respondent did not plead in its answer or otherwise that the rate maintained from Nogales, Ariz., to San Francisco was applicable to the shipments as made); and (2) in failing to find that the Commission had jurisdiction to determine that the joint rate applicable to the shipments as made and exacted by respondent was unjust and unreasonable and to award the damages resulting from this tort.

The court below implied that under the Interstate Commerce Act shippers have a choice of rates. There can only be one lawful rate applicable to particular commerce between particular points under the Interstate Commerce Act. Shippers are not in position to elect which of two or more rates may be applied to particular commerce. Under that Act it is the duty of carriers to collect and of shippers to pay the lawful applicable charge. In this instance the petitioner paid what the respondent demanded in freight charges

and on complaint before the Commission alleged that those charges and not other charges were unjust and unreasonable. Section 1 (5) of the Interstate Commerce Act provides that all *charges* made for any service *rendered* or *to be rendered* in the transportation of property or in connection therewith shall be just and reasonable. The charges here assailed were for services rendered by respondent in respect to through shipments from Navojoa, Mexico, to San Francisco, Calif. The Commission found those charges to have been unjust and unreasonable and awarded damages for that violation of the Act.

The Court below proceeded upon the erroneous assumption that because the respondent published and maintained a rate on carload shipments of cow peas applicable to shipments from Nogales, Ariz., to San Francisco, Calif., which was not alleged to be or found to be unreasonable, the respondent met its full duty under the Act, and by holding that the shipper could have obtained the use of that rate if it had billed the shipments in question to Nogales and had rebilled them from that point to San Francisco. In this view the court below appears to have relied upon the decision of this Court in the *News Syndicate case*, 275 U. S. 179. It will be presently shown that the court below misapplied that decision.

In the *News Syndicate case* the Circuit Court of Appeals certified four questions to this Court for consideration and decision of the cause there

before the court. In that case the Commission found certain joint rates on newsprint paper from Thorold, Ont., to New York City, to have been unreasonable and awarded damages to the complainant. The defendants refused to pay the award. Whereupon the complainant there sued to recover on the order of the Commission. The questions certified to this Court in the *News Syndicate case*, 275 U. S. 179, were:

> "1. Where a railroad of the United States and a railroad of the Dominion of Canada unite in the publication of a joint through rate from a point within the Dominion of Canada to a point within the United States, the rate covering transportation both in Canada and in the United States, has the Interstate Commerce Commission of the United States jurisdiction, on complaint of a shipper or consignee made against the United States railroad alone, to determine the reasonableness of such joint through rate?
>
> 2. Where a shipper or consignee of freight shipped to it at a destination in the United States from such point in the Dominion of Canada has paid at destination to the United States railroad the full published joint through freight rate thereon, has the Interstate Commerce Commission, upon a finding by it that such joint through rate was unreasonable and unjust, but in the absence of a finding that the charges for the transportation in so far as it took place within the United States were unjust and unreasonable, jurisdiction to make an order for

the payment of damages to such shipper or consignee in the amount that the entire transportation charges on the basis of the joint through freight rate exceeded the charges which would have been assessed on the basis of the joint through freight rate found by the Commission to have been reasonable?

3. When the Interstate Commerce Commission had made such an order against the United States carrier alone for the payment of damages arising from its finding of the unreasonableness of such published joint through rate, can a suit thereon, under section 16, of the Interstate Commerce Act, be maintained solely against the United States carrier?

4. Did the district court err in sustaining the demurrer to said petition?"

The Court answered the questions categorically as follows:

"Question 1 is answered 'Yes, for the ascertainment of damages.'
Question 2 is answered 'Yes.'
Question 3 is answered 'Yes.'
Question 4 is not answered."

The answers to the certified questions are unqualified authority for the jurisdiction exercised by the Commission in the instant case. But the court below appears to have been influenced by certain statements made by this Court in its preliminary discussion of these questions rather than by

the categorical answers to the questions made by this Court.

In its discussion of these questions in the *News Syndicate case*, this Court said:

> "(1) As to Question 1.—The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York City. Section 1 (1) and (2). It was the duty of defendants in error to establish just and reasonable rates for that service. Section 1 (5); section 6 (1) and (7). They failed to make or publish any rate applicable to that part of the transportation. Section 8 makes them liable for damages sustained in consequence of such failure. Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error. Its right to reparation does not depend upon the amounts retained by defendants in error pursuant to agreed divisions. Louisville & Nashville R. Co. v. Sloss-Sheffield Co., 269 U. S. 217, 231, 46 S. Ct. 73, 70 L. Ed. 242. Their breach of the statutory duty was a proximate cause of the losses complained of. The failure to establish rates covering the transportation from the international boundary contravened the provisions of the act and compelled plaintiff in error to pay the through charges complained of. The Commission had jurisdiction to determine whether plaintiff in error was entitled to an 'award of damages under the provisions of this act for a violation thereof.' Section 16 (1). And it was the duty of the Commission

to ascertain the damages sustained. It is obvious that, in the ascertainment of damages, the Commission had jurisdiction to determine the reasonableness of the charges exacted.

(2) As to Question 2.—The Commission did not specifically find whether the portions of the charges fairly attributable to transportation within the United States were excessive to the extent that the through rates were found unreasonable. While the findings seem to indicate that the Commission held the entire excess should be charged against the American lines, we shall consider the question on the basis therein stated. The Canadian lines furnishing the transportation from Thorold to the international boundary were not before the Commission and were not sued. The defendants in error participated in the making of the through rate and actually collected the excessive charges. By their failure to comply with the act, plaintiff in error was compelled to pay charges based on the through rates. On the facts stated, the Commission was authorized to hear the complaint, section 13 (1); and had jurisdiction to make the order, section 16 (1). The question should be answered in the affirmative.

(3) As to Question 3.—The statement of the case and what has been said as to questions 1 and 2 make it plain that this question should be answered in the affirmative.

(4) As to Question 4.—Section 239 authorizes the Circuit Court of Appeals to certify to this court any questions or propositions of law concerning which instructions are desired

for the proper decision of the cause.' It is well settled that this statute does not authorize the lower court to make, or require this court to accept, a transfer of the case. The inquiry calls for decision of the whole case. It is not specific or confined to any distinct question or proposition of law, and therefore need not be answered. The Folmina, 212 U. S. 354, 363, 29 S. Ct. 363, 53 L. Ed. 546, 15 Ann. Cas. 748; United States v. Bailey, 9 Pet. 267, 273-274, 9 L. Ed. 124; United States v. Mayer, 235 U. S. 55, 66, 35 S. Ct. 16, 59 L. Ed. 129, and cases cited."

This Court said nothing in its discussion of the certified questions that is authority for the finding made by the court below. While the question whether in the *News Syndicate case* the carriers published or maintained a rate from the international border was not embodied in any of the questions certified, this Court said in discussing this point that

"The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York City. Section 1 (1) and (2). It was the duty of defendants in error to establish just and reasonable rates for that service. Section 1 (5); section 6 (1) and (7)."

and that

"They failed to make or publish any rate *applicable* to that part of the transportation.

> * * * The failure to establish rates covering the transportation from the international boundary contravened the provisions of the act and compelled plaintiff in error to *pay the through charges* complained of. * * * It is obvious that, in the ascertainment of damages, the Commission had jurisdiction to determine *the reasonableness of the charges exacted.*" (Italics ours).

At another point, in discussing question 1, the Court said

> "Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error."

The jurisdiction exercised by the Commission in the instant case in its interpretation of the statute squares with the conclusions of this Court in the *News Syndicate case.* It is settled law that the charging of an unreasonable rate is a tort and that in awarding damages the Commission exercises a quasi-judicial function. *Southern Pacific Co. v. Darnell-Taenzer Co.*, 245 U. S. 531, 534; *Baer Bros. v. Denver & R. G. R. R. Co.*, 233 U. S. 479, 486. See also *Louisville & Nashville R. R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 295 Fed. 53, 59, 269 U. S. 217, 232; and *International Nickel Co. v. Dir. Gen.*, 66 I. C. C. 627, 628. In the *Sloss-Sheffield case* this Court held that the liability of a carrier for exacting unlawful charges is joint and several and that the liability arises

out of the wrongful exaction from the shipper, not out of the unlawful receipt or unjust enrichment by the carrier and, further, that every carrier which participated in the infliction of this wrong is liable *in solido* like every other joint tort feasor.

In the *News Syndicate case* this Court, after reciting that the Interstate Commerce Act applies to the lines that carried and to the transportation from the international boundary, stated that it was the duty of the carriers to establish just and reasonable rates applicable "*for that service.*" In the instant case respondent did not publish or maintain a rate applicable to the transportation service performed within the United States on through shipments as made from Navojoa, Mexico, through the border point to San Francisco.

We submit that the court below made its fundamental error in holding that the respondent met its full duty by having maintained a rate from Nogales which would have been applicable to shipments of cow peas originating at that point or which may have been rebilled from that point to San Francisco. The court below also erred in the view that even if, assuming that the rate from Nogales to San Francisco was applicable to the shipments, that fact would relieve the respondent from liability as a tort feasor in failing to apply that rate and in exacting from petitioner an unreasonable charge and that that fact would also deprive the Commission of jurisdiction to deter-

mine the question. The court below assumed that because in the *News Syndicate case* this Court held that the railroads there involved had committed a tort by failing to establish a reasonable rate applicable to that part of the transportation service which took place within the United States, no tort could be committed by the railroads in respect to the joint rate itself. This is a *non sequitur*.

In dealing with this question in *Cyanamid and Cyanide from Niagara Falls*, 155 I. C. C. 488, at page 491, which is the most comprehensive decision of the Commission since the decision of this Court in the *News Syndicate case*, the Commission said:

> "It must be borne in mind, however, that the questions certified to the court and its answers were addressed to a suit for damages based upon a reparation order made and entered by us. The holding that the United States carriers in that case had committed a tort in failing 'to make or publish any rate *applicable* to that part of the transportation' (which took place within the United States) *is not conclusive that they could commit no tort in respect of a joint international rate.* To find otherwise would be to free from any regulation every joint international rate now participated in by the United States lines, and to render impotent our jurisdiction even over that portion of the transportation which 'takes place within the United States.' And this would be true not

> alone as to the 'reasonableness' of such rates, which was the only question considered by the court, but to questions of undue prejudice and unjust discrimination as well." (Italics ours).

This is an apt statement of the Commission's construction of the decision of this Court in the *News Syndicate case* as applied to a situation where that decision was of importance. In dealing with the question in that case, the Commission also stated that

> "If the duty of the United States carriers to publish rates to and from the international boundary, referred to by the court, is exclusive and all embracing, then it must follow that participation in a joint international rate is *ipso facto* unlawful. We do not so construe the law. Moreover, such construction would not square with the statement of the court that 'had the through rate been just and reasonable, no damages would have resulted to plaintiff in error.' It is impossible to conceive of a 'just and reasonable' rate as the product of a tortious act."

In the *Cyanamid case* the railroads contended that under the decision of this court in the *News Syndicate case* the Commission did not have the power to determine whether or not a rate was unreasonable except for the ascertainment of damages. The Commission held otherwise and said

> "The fact that a portion of the transportation takes place within a foreign country might make proof of unlawfulness more difficult. *But proof should not be confused with responsibility.*" (Italics ours).

Where as in the instant case the Commission exercises a quasi-judicial function to determine whether the charges exacted by a common carrier under a joint international rate were unjust and unreasonable, the fact that certain of the railroads which participate in the joint rate are located in a foreign country is not material or controlling. As this Court said in the *News Syndicate case*

> "The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York City."

The carriers within the United States which participate in a rate that is unjust and unreasonable are joint tort feasors, and are jointly and severally liable for damages resulting therefrom.

The finding of the lower court, if sustained, is tantamount to holding that carriers subject to the Interstate Commerce Act may be relieved from the duties imposed by that Act by the mere form in which they elect to publish rates. Otherwise expressed, it means that a carrier may exact unreasonable charges under a joint rate and escape the jurisdiction of the Commission and of the

courts as to responsibility for its act as a joint tort feasor, merely by publishing a rate from the international boundary, irrespective of the question whether that rate is used for the services rendered. Neither the Interstate Commerce Act nor the decision of this Court in the *News Syndicate case* may properly be construed to bring about such a result.

The respondent has sensed the seriousness of such consequences by the rather vague contention that the decision of the court below should not be construed as holding that international joint through rates are entirely free from the restraints of Section 1 (5) of the Interstate Commerce Act. If the Interstate Commerce Commission has no jurisdiction to determine in a case of this kind whether the carrier subject to its jurisdiction committed a wrong prohibited by the Interstate Commerce Act in joining in an unreasonable international joint rate because the same carrier published a rate applicable to shipments rebilled at the border, it is difficult to conceive under what circumstances the Commission could assert jurisdiction over the joint rates. The truth is that if the decision of the court below is sustained the respondent will be free from the restraints imposed upon carriers by Section 1 (5) of the Interstate Commerce Act as to the joint rate charged which the Commission found unreasonable.

In *United States v. Pacific & Arctic R. & N. Co.*, 228 U. S. 87, the Court dealt with the lawfulness

of an agreement between connecting railroads, steamship carriers and a wharfage company to establish through routes and joint rates for transportation between Puget Sound and points in Alaska and Canada. The case arose on indictments charging violation of the anti-trust laws and unjust discrimination in wharfage charges. The combining companies there established through routes and joint rates and by agreement fixed so-called local rates substantially higher than the railroads' share of the through rate. In this way they forced all shippers to ship by the through route and joint rates. This Court held that there was a violation of the anti-trust act and the Interstate Commerce Act but that the question of unjust discrimination under the Interstate Commerce Act could not be redressed by the courts in either a criminal or civil proceeding in advance of action by the Commission. The Court also held that the fact that part of the transportation route was outside of the United States did not prevent the application of the Federal statutes, and made the following comment in respect to the contention of the defendants that as part of the transportation route was outside the United States the Federal laws do not apply:

> "This is but saying that laws have no extraterritorial operation; but to apply the proposition as defendants apply it would put the transportation route described in the indictment out of the control of either Canada

> or the United States. These consequences we cannot accept. * * * If we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens and corporations operating in our territory, as we undoubtedly may control our own citizens and our own corporations."

The principle announced by this Court in the *Pacific & Arctic case* is applicable to the instant case because here as in that case the respondent carrier whose property is in the United States joined a foreign corporation in maintaining a joint rate and applied that rate in exacting charges from petitioner, which the Commission found to be unjust and unreasonable.

That traffic transported on through bills of lading between points in the United States and points in a foreign country is subject to the provisions of the Interstate Commerce Act is settled. *Armour & Co. v. United States*, 209 U. S. 56. In *C., N. O. & T. P. R. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, the validity of an order of the Commission relating to transportation from Cincinnati to destinations in Georgia was involved. One of the defendants, the Georgia Railroad Company, with lines wholly within Georgia, assessed local charges for services within Georgia and contended that this transportation being wholly within the state did not come within the scope of the Interstate Commerce Act. This

Court held that the Georgia Railroad, having elected to enter into the carriage of interstate freight and thus subjected itself to the control of the Interstate Commerce Commission, it would not be competent for that company to limit that control in respect to foreign traffic to certain points on its road and to exclude other points.

In *Illinois Central R. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, the Court considered the validity of an order of the Commission. The rate involved applied from shipping points in Louisiana, Mississippi and Alabama to Ohio River crossings and was a separately stated rate factor to apply on lumber transported beyond the crossings. With respect to the Commission's power over the through charges, the Court said at page 465:

> "It is said that it was error to hold the advance unreasonable and unjust because the charges made on lumber to Cairo and other points on the Ohio River 'are mere divisions of through rates, the justness of which neither the Interstate Commerce Commission nor the Circuit Court has any jurisdiction to determine.' Indeed, it is said, to do so is an exercise of a legislative function. We think the contention is in effect answered by *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184; 40 L. ed. 935; 5 Inters. Com. Rep. 391; 16 Sup. Ct. Rep. 700. If the contention is intended to be as extensive as its words seemingly make it, it would withdraw from the supervision of

the Interstate Commerce Commission and from the courts every shipment over two or more railroads. There necessarily must be some apportionment of the rates between such roads, and whether the advance should be made in the rates over one road or the other, or in the rates over all, can make no difference. *In other words, it is competent for the Commission or the courts to consider the through rate, however composed.*" (Italics ours).

Point 2.

The decision of the court below is contrary to and in conflict with the interpretation of the Interstate Commerce Act as applied by the Interstate Commerce Commission in numerous cases over a period of more than twenty years.

For more than twenty years the Interstate Commerce Commission has exercised jurisdiction to determine whether joint international rates between points in the United States and points in either Canada or Mexico, were unjust and unreasonable and during that period it has been its constant practice to determine whether such rates are unjust and unreasonable and to award damages where the circumstances warrant such action. It was an order of this character that reached the Supreme Court in the *News Syndicate case. Black Horse Tobacco Co. v. I. C. R. R.*, 17 I. C. C. 588; *Tennessee Extract Corp. v. L. & N. R. R. Co.*,

128 I. C. C. 709; *Ontario Paper Co. v. C. N. Rys.*, 95 I. C. C. 66; *Grasselli Chemical Co. v. B. & O.*, 89 I. C. C. 383; *American Cyanamid Co. v. Dir. Gen.*, 69 I. C. C. 337; *American Cyanamid Co. v. Michigan Central* 51 I. C. C. 236; *Spanish River Pulp & Paper Mills v. A. & W. Rwy. Co.*, 113 I. C. C. 343; *International Nickel Co. v. Dir. Gen.*, 66 I. C. C. 627; *Lake Superior Paper Co. v. Dir. Gen.*, 61 I. C. C. 709; *Minnesota and Ontario Paper Co. v. N. P. Rwy.*, 66 I. C. C. 571; *Commercial Club of Omaha v. B. & O.*, 52 I. C. C. 225; *Bloedel-Donovan v. Director General*, 68 I. C. C. 95; *Monarch Paper Co. v. Can. Pac.*, 53 I. C. C. 620.

Since the decision of this Court in the *News Syndicate case* handed down in November, 1927, the Commission has continued to assert jurisdiction to determine whether joint international rates are just and reasonable. *Cyanamid & Cyanide from Niagara Falls*, 155 I. C. C. 488; *Atlantic Fish Co. v. C. N. R.*, 148 I. C. C. 533; *Charles B. Justice Co. v. Holton I. R. Co.*, 153 I. C. C. 673; *San Diego Oil Products Corp. v. Holton I. R. Co.*, 164 I. C. C. 505.

This Court has held in many cases that a definitely settled administrative construction of a statute by those charged with its enforcement is entitled to the highest respect and that if such a construction is acted on for a number of years it will not be disturbed except for cogent reasons. *United States v. Missouri Pacific R. R. Co.*, 278 U. S. 269; *Logan v. Davis*, 233 U. S. 613.

The construction of the statute upon which the order of the Commission here involved was based, has been uniformly applied by it over a long period of time, at least twenty years. This, as the Court has recognized, is a fact entitled to the highest respect. In addition, it is significant that in the only case which reached this Court where this construction of the statute was challenged, the Court upheld the Commission.

The court below apparently seized upon certain parts of the language in the preliminary discussion in the opinion of Mr. Justice Butler respecting the questions certified to the court in the *News Syndicate case* as authority for the proposition that because the opinion said in the discussion of the certified questions that the railroads there committed a wrong in failing to establish and publish applicable rates from the international boundary, they could not be guilty of a wrong in respect to the joint rate itself. The jurisdiction of the Commission exercised over a long period of years and upheld by this Court in the *News Syndicate case* should not be reversed on the strained construction of certain parts of the language of the opinion of the court in discussing the questions certified in the *News Syndicate case.* The categorical answer to the questions by the Court disposes of the jurisdictional point here involved and is a complete answer to respondent's contention. On these reasons alone the decision of the court below should be reversed. *Non quod dictum est, sed quod factum est, inspicitur.*

Point 3.

The jurisdiction of the Interstate Commerce Commission over the subject matter is clear and the construction of the statute as applied by the Commission in this instance is correct and in accordance with the construction placed upon the statute by the Commission, which this Court upheld in *News Syndicate Co. v. N. Y. C.* 275 U. S. 179.

The jurisdiction of the Interstate Commerce Commission over the subject matter is beyond question. The respondent is subject to the Interstate Commerce Act and the commerce is subject to that Act.

The amendment to Section 1 (1) of 1920 which added the words "but only in so far as such transportation or transmission takes place within the United States" is of no special significance, although the court below appears to have accepted respondent's contention that the jurisdiction of the Commisison was thereby restricted. The language of this Court in *United States v. Pacific & Arctic R. & N. Co.*, 228 U. S. 87, already referred to, in respect to a somewhat similar contention there made that "this is but saying that laws have no extraterritorial operation" is, we think, applicable here. If the so-called restricting language were excluded from the Act the Commission would still be without extraterritorial powers. The Commission is not required to exercise extraterri-

torial powers to determine in a given case whether a carrier subject to the jurisdiction of the Act is liable for damages as a joint tort feasor for committing a wrong forbidden by that Act.

Under Section 1 (5) it is the duty of common carriers to establish and maintain just and reasonable charges for any service *rendered* or *to be rendered.* Under Section 6 (1) it is the duty of carriers to file, print and keep open to public inspection schedules showing the rates and charges for transportation between different points. Common carriers are made liable for damages for violations of the Act by Section 8, and the Commission has authority to award damages for violations of the Act under Section 16 (1).

Section 1 (5) of the Interstate Commerce Act provides that "all charges made for any service rendered or to be rendered in the transportation of passengers or property * *" by carriers subject to the Act shall be just and reasonable and that every unjust and unreasonable charge is unlawful. This requirement is independent of Section 6 of the Act which provides that charges must also be published between different points. The charge exacted by respondent in the instant case for the transportation service rendered was based upon the joint rate which the Commission found unreasonable. This suit does not involve rates or charges on transportation services *to be rendered* from Nogales or elsewhere. To hold, as the court below did, that the respondent met its full duty

under the Act by maintaining a rate from Nogales which might be applicable to a shipment originating at that point or to a shipment originating in a foreign country and rebilled from that point where the carrier actually exacted charges based upon another rate, means that in such circumstances the carrier may with impunity join carriers in foreign countries in maintaining and applying unreasonable charges. The ruling of the court below, if correct, also means that the act of the respondent in exacting unreasonable charges under a joint international rate puts the transaction out of the control of the United States and of the power of the Commission by the mere expedient on the part of the carrier in publishing a rate from the border point, even though not applied to the service rendered. This allows mere form to control the important question of jurisdiction.

We do not believe that this Court held or meant to hold in the *News Syndicate case* that where a carrier exacts unreasonable charges based upon a joint rate, it may escape liability as a tort feasor by setting up a plea in a given case that it maintained a rate from the border which might have been applicable to shipments originating at or rebilled from that point. In the *Pacific and Arctic Railroad and Navigation Company case*, where contentions similar to those made by respondent here were before this Court, it said "these consequences we cannot accept," and in the *News*

Syndicate case, the Court said that "had the through rate been just and reasonable, no damages would have resulted to plaintiff in error." This language negatives the idea that by publishing a rate from a border point irrespective of whether it is applied, carriers in this country are immune from the duty imposed on them by Section 1 (5) of the Act of exacting just and reasonable charges for services rendered irrespective of the manner of publication or of determining the charge.

The fact that a corporation operating in this country joins a foreign carrier in maintaining and applying a joint rate may make it more difficult to prove that the rate exacted was unlawful. But, as stated by the Commission in the *Cyanamid case*, proof should not be confused with responsibility. In the instant case the question before the Commission was whether or not the charges that were exacted by respondent for the services rendered were unreasonable as alleged, not whether some other charge, which might have been exacted on other shipments in respect to services to be rendered, were unreasonable. Otherwise stated, the question before the Commission was whether or not what the respondent did violated the Interstate Commerce Act, not what it might have done under different circumstances. The view taken by the Commission in the *Cyanamid case*, already referred to, that the holding of this Court in the *News Syndicate case* that the carriers there committed a tort in failing to make or publish any

rate applicable to the transportation service from the border is not conclusive that the carriers could commit no tort in respect to the joint rate itself, is sound and conforms to general principles applicable to tort feasors.

We do not believe that this Court will hold that the question of the power of the Commission as to charges exacted by carriers subject to the Interstate Commerce Act for services rendered in connection with commerce subject to that Act may turn on the mere manner in which the railroad elects to publish and maintain rates and charges. In the *News Syndicate case* the failure of the carriers to establish just and reasonable charges applicable to that part of the transportation service within the United States was held by the Court to violate the Interstate Commerce Act. When the Court said in that case that it was the duty of the carriers to establish just and reasonable rates applicable to the service of transportation within the United States it meant that the carrier would meet its duty under the Act only if it established and *applied* rates from the border to the transportation service actually performed. It did not mean to say, as contended by respondent here, that a carrier could escape liability as a tort feasor from participation in and the use of an unreasonable joint rate by the mere gesture of publishing a paper rate from the border point which the carrier neither applies nor pretends to apply to through international commerce such as is here involved.

CONCLUSION.

For the reasons stated the decision of the court below should be reversed. It erred in holding (a) that the petitioner was not compelled to pay the joint through rate by reason of any violation of the Act by respondent, (b) that the Interstate Commerce Commission was without jurisdiction over the subject matter, (c) that the respondent did not violate the Interstate Commerce Act, and (d) it was influenced by what the court said in its discussion of the certified questions in the *News Syndicate case* instead of by what the court did in that case.

Respectfully submitted,

ROBERT E. QUIRK,
Counsel for American Cyanamid Company, as Amicus Curiae.

March 31, 1931.

APPENDIX.

Statutes Relied Upon.

The Interstate Commerce Act:

Section 1 (1): (41 Stat. L. 474)

"That the provisions of this Act shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or

(c) The transmission of intelligence by wire or wireless;—from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States."

Section 1 (5): (41 Stat. L. 474)

"All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. * * *".

Section 6 (1): (34 Stat. L. 584; 41 Stat. L. 483)

"That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also

state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. * * *"

Section 6 (7): (34 Stat. L. 584)

"No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Section 8: (24 Stat. L. 379)

"That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

Section 16 (1): (34 Stat. L. 584; 41 Stat. L. 491)

"That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

SUPREME COURT OF THE UNITED STATES.

No. 520.—October Term, 1930.

Lewis-Simas-Jones Company, Petitioner, *vs.* Southern Pacific Company.	On Writ of Certiorari to the District Court of Appeal, First Appellate District, State of California.

[May 25, 1931.]

Mr. Justice Butler delivered the opinion of the Court.

Petitioner sued respondent in the superior court of the city and county of San Francisco, California, to recover damages alleged to have been caused by the exaction of freight charges which had been found excessive by the Interstate Commerce Commission in a reparation case. 102 I. C. C. 245. A jury being waived, the court made findings of fact, stated its conclusions of law and dismissed the case on the ground that the Commission's findings and order were void for lack of jurisdiction. The district court of appeal affirmed, 162 Cal. App. 595, the state supreme court declined to hear the case, and this court granted a writ of certiorari. 282 U. S. —.

Defendant is an interstate carrier by railroad. Its lines connect with a line of a Mexican common carrier by rail extending from Navojoa, Sonora, to the international boundary at Nogales, Arizona. In 1923 defendant, in conjunction with the foreign line, transported three carloads of cow peas from Navojoa to San Francisco. The shipments moved at different times on through bills of lading issued by the foreign line. The rate charged was $1.33 per hundred pounds, stated in a tariff joined in by the carriers and filed with the Interstate Commerce Commission and the Department of Communications and Public Works of Mexico. The carriers agreed to divide the rate, 63.175 cents to the foreign line and 69.825 cents to the defendant.

The cow peas were transported by the foreign line 377 miles to the boundary, thence by defendant 1,036 miles to destination. The defendant collected from plaintiff $3,828.74 as freight charges

and that amount was divided in accordance with the divisions agreement. The average yield on these shipments was 90 cents per car mile and 18.8 mills per ton mile for the entire distance, 1,413 miles. The average yield to the foreign line was $1.60 per car mile and to defendant 64.6 cents.

The trial court found that defendant, by tariff filed with the Interstate Commerce Commission, maintained a rate of $1.14½ applicable to carload shipments of cow peas destined to San Francisco "originating at Nogales", "originating at the point where the lines" of the foreign carrier and of defendant touch the boundary or "loaded into cars at any point upon or adjacent to said international boundary line, within the limits of defendant's railroad yards at Nogales". The court found that the cow peas were in sacks and readily could have been transported, by means other than a railroad, to Nogales there to be loaded into cars for transportation over defendant's lines to San Francisco at the rate of $1.14½, that the Commission had made no finding in respect of such rate, and that it was "reasonable and lawful for application upon carload shipments of cow peas from Nogales, Arizona, including such shipments as might be loaded at any and all places within the railroad yard limits at that point, destined to San Francisco, California."

It was not found, and it does not appear from the record, that the defendant established or made available to shippers any rate applicable to the transportation over its lines from the boundary to San Francisco of cow peas in car loads originating at Navojoa or elsewhere in Mexico and delivered to defendant at such boundary point by a connecting railroad for transportation to San Francisco. The record does not disclose what, if any, rate was available for the transportation of the cow peas as a local shipment from Navojoa to Nogales. And it may not reasonably be assumed that the charges of the foreign carrier for such transportation would be less than the amount it was entitled to have out of the joint through rate under its agreement with defendant. Indeed, under the principles ordinarily applied in making divisions agreements, in the absence of a special allowance or arbitrary differential, the foreign carrier's share of the through rate would be less than its local rate.

If defendant's local rate of $1.14½ be deemed to be applicable to the American part of the through transportation and the foreign carrier's proportion, 63.175 cents, of the joint rate be taken as the local rate from Navojoa to the boundary, the sum of the locals would amount to slightly more than $1.77½ as against the joint through rate of $1.33. There is nothing in the record to indicate that there was available for the transportation of such cow peas any rate or combination of rates less than the rate of $1.33.

The Commission found that at the time the cow peas were being transported defendant concurred in a rate of 94 cents per hundred pounds on garbanzos (a kind of pea) from Navojoa to San Francisco; that the rate of $1.33 for the transportation of the cow peas was unreasonable to the extent that it exceeded the 94 cent rate; that the shipments moved as described; that plaintiff paid and bore the freight charges; that so far as defendant participated in such transportation and rates it was a tort-feasor and that it should make reparation for the damage to complainant in the sum of $1,122.72 with interest. And by its order the Commission authorized and directed defendant to pay complainant that sum.

Defendant having refused to make reparation, plaintiff brought this action and in its complaint alleged the transportation, the unreasonableness of the rate as found by the Commission, showed the charges paid by it to defendant, made the Commission's report and order a part of the complaint and prayed judgment for the amount of damages found by the Commission.

Defendant's answer admitted the transportation, the rate exacted and the charges collected. It alleged that defendant maintained a rate applicable on cow peas in carloads from the international boundary at Nogales to San Francisco but it did not specify that rate or state that it was reasonable. It averred that the Commission had not found such rate unjust, unreasonable or otherwise in violation of law and that the Commission had no jurisdiction to order the defendant to pay any reparation or damages.

The opinion of the district court of appeal differentiates this case from *News Syndicate Co.* v. *N. Y. C. R. R.*, 275 U. S. 179, on the ground that it there appeared that the carrier violated the Act by failing to maintain a rate to cover the transportation from the international boundary to destination thereby compelling the

shipper to pay the excessive joint through rate and that, for the determination of damages, it was necessary for the Commission to determine the reasonableness of such rate. But the court said that in this case defendant published and maintained a rate on shipments from the boundary to destination which was not found unreasonable by the Commission and plaintiff was not compelled to pay the joint through rate by reason of any violation of the Act on the part of the defendant.

We are of opinion that the record shows that the Commission had jurisdiction to determine the reasonableness of the joint through international rate.

The Act does not empower the Commission to prescribe or regulate such rates. It applies to international commerce only in so far as the transportation takes place within the United States.* The Act applied to the transportation of the cow peas from the boundary to destination and required defendant to establish just and reasonable rates for that service. And defendant was liable to shippers for damages resulting from its failure so to do. §§ 1 (1) (c), (2) and (5), 6 (1), (7) and 8.

The Act prohibits every excessive charge, whether exacted directly or obtained by indirection, and its provisions are designed to prevent evasion of the rule that every charge for transportation shall be just and reasonable. The collection by a common carrier of exorbitant charges is a tort (*Smith* v. *The Chicago & Northwestern Railway Co.*, 49 Wis. 443, 448) and the general rule as to liability of joint tort-feasors applies where two or more connecting carriers combine to impose excessive charges for transportation over their connecting lines. *L. & N. R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, 232-233. Defendant is liable for any violation of the Act by it that caused or contributed to cause damage to plaintiff without regard to the proportion of the charges attributable to the foreign transportation or paid to the foreign carrier. *News Syndicate Co.* v. *N. Y. C. R. R.*, *supra*, 187-188.

*The Act does not authorize or forbid the making of joint through international rates. The Commission, recognizing that they are of great convenience to carriers and shippers, does not object to their maintenance if shown, together with the agreed divisions, in tariffs filed in compliance with requirements prescribed by it. Tariff Circular 18A, Rule 72, adopted November 22, 1909, addition adopted March 7, 1910. *Publication of Rates Between United States and Canada*, 147 I. C. C. 778.

The Act does not create a cause of action based on the Commission's findings and reparation order for the recovery of money collected as freight charges based on rates alleged to be unjust and unreasonable. It makes a determination by the Commission of the unreasonableness of the rate attacked and the extent that it is, if at all, excessive a condition precedent to suit.

Section 16 (2) provides that, if the carrier shall not comply with an order for the payment of money within the time specified, the person for whose benefit it was made may file in the district court of the United States "or in any state court of general jurisdiction" a petition setting forth briefly "the causes for which he claims damages and the order of the Commission", and that the suit in the United States court shall proceed in all respects "like other civil suits for damages" except that the findings and order of the Commission shall be prima facie evidence of the facts therein stated. The section contains nothing relating to evidence or procedure in state courts. It is clear that the action is not on the award as such. *Meeker & Co.* v. *Lehigh Valley R. R.*, 236 U. S. 412, 430. But no action for damages alleged to have been caused by the exaction of excessive rates for interstate transportation can be maintained in any court, state or federal, in the absence of a prior finding by the Commission that the rate charged was unreasonable. The reasons upon which this rule rests have been fully stated in our decisions. *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 444. *Robinson* v. *B. & O. R. R.*, 222 U. S. 506, 510. Cf. *B. & O. R. R.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 498. *Great Northern Ry.* v. *Merchants Elev. Co.*, 259 U. S. 285, 291-292.

There is no essential difference in this respect between a claim arising out of interstate transportation and the one under consideration. The Act applies to the interstate rate, and an excessive charge for the transportation covered by it is a direct and immediate violation. While the Act does not govern the joint through international rate, the demand for reparation is grounded upon the claim that the maintenance of that rate participated in by the American carrier and its violation of the Act, in failing to maintain a just and reasonable rate for the transportation from the boundary to destination, operated to compel payment of the charges based on the excessive joint rate.

The complaint before the Commission alleged that the joint through rate was unreasonable and was charged in violation of the Act. It was undoubtedly sufficient to invoke the jurisdiction of the Commission. The only requirement (§ 13) is that it "shall briefly state the facts". Reparation proceedings before the Commission properly may be and frequently are quite informal. Many claims on account of excessive charges are dealt with and finally disposed of, without formal pleading or proof, by means of correspondence carried on by the Commission with claimants and carriers respectively. Rule III (b). Defendant did not apply to the Commission for authority to make the reparation claimed. It moved to dismiss the complaint alleging that the Commission lacked jurisdiction over rates from points in an adjacent foreign country to points in the United States. The motion was denied on the authority of *International Nickel Co.* v. *Director General*, 66 I. C. C. 627. The record does not show the contents or substance of defendant's answer referred to in the order. It does not appear what, if any, issue was joined as to the facts. It is the duty of the Commission, if there appears "any reasonable ground for investigating" the complaint, to investigate the matters complained of "in such manner and by such means as it shall deem proper". § 13. The report shows that the case was presented under shortened procedure and, having regard to the rules of practice, this implies that there was a formal complaint but no oral hearing. Rule X-A. The evidence referred to in the report fully sustains the finding that the joint through rate of $1.33 was unreasonable to the extent that it exceeded the 94 cent rate contemporaneously applied to like transportation of garbanzos.

The trial court's findings are not sufficient to show that at the time the shipments in question moved defendant maintained a just and reasonable rate applicable to the transportation of such shipment over its lines from the international boundary to destination.

The tariff, as described in the findings, does not purport to apply to the American part of such international transportation. A carload shipment "originating" at Nogales or at the point where the line of the foreign carrier and that of the defendant touch the boundary or in defendant's railroad yard adjacent to the boundary clearly must be distinguished from a through carload shipment brought to defendant at the boundary by a foreign carrier. The

former covers local transportation only and involves two terminal services, one at Nogales, the point where received from the shipper, and the other at San Francisco, the place where delivered to the consignee. The latter involves the transportation of a through car from the point of connection and only the one terminal service at destination. It is manifest that a tariff limited, as is that described in the findings, to shipments so originating on defendant's line does not apply to the American part of the transportation of an international shipment on a through bill of lading. It is to be presumed that if any tariff covering that part of the through service existed, defendant would have produced it; and, in view of the facts shown, the burden was upon the carrier to bring forward evidence that a rate therefor had been established as required by the Act. It follows that the lower court erred in distinguishing this case from the *News Syndicate Co.* v. *N. Y. C. R. R.*, *supra*. That case controls this one.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.